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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 791

SEWELL LEE AVERY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

No. 792

SEWELL L. AVERY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 16, 1934.

CERTIORARI GRANTED MARCH 19, 1934.

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1 Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue, *Respondent.* } Docket No. 40238

Appearances:

For Taxpayer: Morris L. Johnston, Esq., Leland K. Neeves, Esq.

For Comm'r: Chester A. Gwinn, Esq.

DOCKET ENTRIES.

1928

Aug. 13—Petition received and filed. Taxpayer notified. (Fee paid.)

Aug. 14—Copy of petition served on General Counsel.

Oct. 6—Answer filed by General Counsel.

Oct. 10—Copy of answer served on taxpayer. General Calendar.

1931

Sep. 23—Hearing set Nov. 10, 1931.

Sep. 28—Motion to place on the Chicago Circuit Calendar filed by txpayer. 10/27/31 granted.

1932

Jul. 12—Hearing set in Chicago, Illinois, beginning Sept. 6, 1932.

Sep. 19—Hearing had before Mr. Trammell on merits. Submitted. Stipulation of facts filed. Petitioner's brief due in 2 weeks—2 weeks for reply—respondent's brief due 2 weeks after petitioners! Calendar call September 6, 1932.

Oct. 3—Brief filed by taxpayer.

Oct. 11—Transcript of hearing of September 19, 1932, filed.

Oct. 31—Motion for extension to Nov. 14, 1932, to file brief and to Nov. 30, 1932, to file reply brief, filed by General Counsel. 11/1/32 granted.

Nov. 14—Brief filed by General Counsel.

Nov. 29—Reply brief filed by taxpayer.

1933

Feb. 2—Memorandum opinion rendered, Charles M. Trammell, Div. 2. Judgment will be entered for the respondent.

Feb. 2—Decision entered, Charles M. Trammell, Div. 2.

Feb. 27—Motion for review by entire Board, filed by taxpayer.

Feb. 27—Order denying motion for review entered.

Mar. 6—Motion to fix amount of bond filed by taxpayer.

Mar. 8—Order fixing amount of bond in the amount of $162,000 entered.

Apr. 18—Supersedeas bond in the amount of $162,000 approved and ordered filed.

Apr. 25—Petition for review to U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Apr. 26—Proof of service filed.

May 26—Statement of evidence lodged by taxpayer.

May 29—Notice of lodgement of statement and of hearing June 7, 1933, to approve statement filed.

Jun. 1—Notice of agreement with statement of evidence filed by General Counsel.

2 Jun. 2—Motion to settle statement of evidence filed by taxpayer.

Jun. 2—Praecipe with proof of service thereon filed.

Jun. 3—Statement of evidence approved and ordered filed.

Jun. 19—Order enlarging time to 7/31/33 for transmission and delivery of record entered.

UNITED STATES BOARD OF TAX APPEALS.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue, *Respondent.*
} Docket No. 40238.

PETITION.

Filed Aug. 13, 1928.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency, Bureau symbols IT:AR:B-1, FMAL-60D, dated Washington, June 28, 1928, and as a basis of his proceedings, alleges as follows:

1. Petitioner is an individual, with office at 300 West Adams street, Chicago, Illinois.

2. The Notice of Deficiency, a copy of which is attached

and marked Exhibit A, purports to have been mailed to petitioner on June 28, 1928.

3. The taxes in controversy are, individual income taxes of the petitioner for the calendar years 1924, 1925 and 1926; and for the amount of the deficiency, $101,269.27, for the calendar year 1924, for the overassessment of $20,995.68 for the year 1925 and for the overassessment of $3,791.26 for the year 1926, making a total deficiency of $101,269.87 and a total overassessment of $24,786.94 (see Exhibit A hereto attached).

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue has erred by including in the taxable income of the petitioner for the respective years in question, certain dividends declared by the United States Gypsum Company, an Illinois corporation, in which the petitioner is a stockholder, in the years 1924, 1925 and 1926, but which dividends were not received by the petitioner until the respective years following those in which declared, viz.: The Commissioner has erred by including in the taxable income of the petitioner for the calendar year 1924, dividends of $266,490.10 declared by said company in the year 1924 but not received by the petitioner until January, 1925. The Commissioner has erred by including in the taxable income of the petitioner for the year 1925, dividends of $161,511.70 declared by said company in the year 1925 but not received by the petitioner until January, 1926. The Commissioner has erred by including in the taxable income of the petitioner, dividends of $140,117.30 declared by said company in the year 1926 but not received by the petitioner until January, 1927.

(b) The Commissioner has erred by including said amounts in the taxable income of the petitioner in the years when said dividends were declared, and not in the years when said dividends were received by petitioner, and by including said dividends on the grounds of constructive receipt (see pages 1, 2, 3, 4 and 5 of Exhibit A hereto attached), and has thereby erred by determining a deficiency in petitioner's income tax for the calendar year 1924 of $101,269.87.

(c) The Commissioner has erred by increasing the taxable income of the petitioner for the year 1924 from $116,936.54, as returned by the petitioner, to $383,426.64, by adding to said $116,936.54 the amount of $266,491.10, the latter being the said dividends declared in 1924 but not received by petitioner until January, 1925; and has erred by decreasing the

taxable income of petitioner for the year 1925 from $569,959.67, as returned by the petitioner, to $464,981.27, by first adding to said $569,959.67 the amount of the dividends, $161,511.70, declared by said company in 1925 but not received by petitioner until January, 1926, and deducting the amount of $266,491.10 declared as dividends by said company in 1924 but not received by petitioner until January, 1925; and has erred by decreasing the taxable income of the petitioner for the year 1926 from $471,044.88, as returned by petitioner, to $452,291.42, by first adding to said amount of $471,044.88 the amount of $140,117.30, being the dividends declared by said company in 1926 but not received by the petitioner until January, 1927, and then deducting the amount of $161,511.70, being the dividends declared in 1925 but not received by the petitioner until January, 1926 (see Exhibit A hereto attached).

(d) The Commissioner has erred by

(1) increasing the income tax of petitioner for the year 1924 from $23,965.62, as returned and paid by petitioner, to $125,235.49, and by determining a deficiency for said year of $101,269.87, and

(2) determining an overassessment for the year 1925 of $20,995.68, and

(3) determining an overassessment for the year 1926 of $3,791.26.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner is an individual stockholder in the United States Gypsum Company of Illinois, and said company has its principal office in Chicago, Illinois.

(b) The said United States Gypsum Company, by resolution of its Board of Directors, declared certain dividends upon its capital stock, by resolutions, copies of which are hereto attached and marked Exhibit B and made a part hereof; that the petitioner, at date of December 5, 1924, was the owner of 48,604 shares of the common capital stock and 2,302 shares of the preferred capital stock of said United States Gypsum Company; that petitioner, at the date of December 5, 1925, was the owner of 65,618 shares of the common capital stock and 2,302 shares of the preferred capital stock of said United States Gypsum Company; that petitioner, at the date of December 4, 1926, was the owner of 75,601 shares of the common capital stock and 2,306 shares of

the preferred capital stock of the said United States Gypsum Company.

(c) The petitioner, by reason of his said holdings of stock in said United States Gypsum Company on said dates, and by reason of the said resolutions set forth in Exhibit B hereto attached, was paid, according to the resolutions of November 12, 1924, the sum of $266,490.10, and according to the resolutions of November 12, 1925, the sum of $161,511.70, and according to the resolutions of November 10, 1926, the sum of $140,117.30, as dividends upon the said capital stock held by him.

(d) That the dividend checks of said United States Gypsum Company in payment of the dividends declared as set forth in Exhibit B hereto attached and made a part hereof, were mailed from the office of the company to its various stockholders on December 31st of each of the years 1924, 1925 and 1926 (see Exhibit A, page 2 of Deficiency Notice); and of the dividend checks so mailed, the following were received by petitioner as stated below:

(1) Checks of said company aggregating $266,490.10 in payment of said dividends declared on November 12, 1924, were received by the petitioner in January, 1925;

(2) Checks of said company aggregating $161,511.70 in payment of said dividends declared on November 12, 1925, were received by the petitioner in January, 1926;

(3) Checks of said company aggregating $140,117.30 in payment of said dividends declared on November 10, 1926, were received by the petitioner in January, 1927;

(4) Said petitioner did not receive any of said checks in payment of said dividends in the years in which said dividends were declared, but in each and every case said dividend checks and said dividends were received by the petitioner in the year following the year in which declared.

(e) The petitioner duly filed his income tax returns for the years in question and included in his taxable income the said amounts of said dividends in the respective years in which said dividend checks were received by him, as follows:

$266,490.10 in the year 1925,
$161,511.70 in the year 1926, and
$140,117.30 in the year 1927.

(f) The amounts of taxable income returned by petitioner for the respective years, and amounts of income tax paid by him thereon were:

Income, 1924, $116,936.54, tax, $23,965.62;

Income, 1925, $569,959.67, tax, $108,401.56;
Income, 1926, $471,044.88, tax, $85,764.85
(see Exhibit A attached hereto).

(g) The petitioner kept his books and accounts, prior to and during each of the years 1924, 1925 and 1926, in question, on the "cash receipts and disbursements" basis, and not on the "accrual" basis, and has filed his income tax returns on the same basis of cash receipts and disbursements and not on the accrual basis, and has kept his books and accounts and filed his income tax returns for said periods upon a calendar year basis.

(h) The petitioner relies upon the appropriate provisions of the Revenue laws of 1924 and of 1926, and upon the ground that neither the dividends in question nor the checks of the United States Gypsum Company in payment of the same were received by petitioner until the year respectively following the year in which declared, and upon the decisions of the United States Board of Tax Appeals in the following cases:

Appeal of Robert W. Bingham, 8 B. T. A. 603;
Appeal of H. L. Campbell, 8 B. T. A. 1076;
Appeal of Adnah McMurtrie, 8 B. T. A. 1301;
Appeal of Deposit Trust & Savings Bank, Executor of Estate of Enoch Stott, promulgated April 28, 1928, Docket 12195.

6. Wherefore the petitioner prays that the Board may hear this proceeding and grant to the petitioner relief from the deficiency asserted by the respondent, and in the following and each of the following particulars:

(a) That there be not included in the taxable income of the petitioner for the year 1924 the sum of $266,490.10, being the amount of the dividend declared by the United States
7 Gypsum Company on November 12, 1924, as aforesaid, but not received by petitioner until January, 1925, and that the net income of the petitioner for 1924 be determined to be $116,936.54, as returned by the petitioner for said year; that there be no deficiency in tax determined against the petitioner for the year 1924.

(b) That the net taxable income of the petitioner for each of the years 1924, 1925 and 1926 be determined to be as returned by the petitioner as hereinbefore set forth.

(c) That the correct tax for each of the years 1924, 1925 and 1926 be determined to be as stated heretofore herein to have been paid by said petitioner.

(d) And such further relief as the petitioner may be by law entitled.

12 EXHIBIT A.

TREASURY DEPARTMENT
Washington

Jun 28 1928

Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
and refer to
IT:AR:B-1
FMAL60D

Mr. Sewell Lee Avery,
300 West Adams Street,
Chicago, Illinois.

Sir:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924 to 1926, inclusive, discloses a deficiency of $101,269.87 for the year 1924 and an overassessment of $24,786.94 for the years 1925 and 1926 as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,

D. H. BLAIR,
Commissioner.

By .....
Deputy Commissioner.

Inclosures:
Statement
Form A
Form 882
emb-1

13 Statement

IT:AR:B-1 Jun 28 1928

FMA:60D In re: Mr. Sewell Lee Avery,
300 West Adams Street,
Chicago, Illinois.

Year	Deficiency	Overassessment
1924	$101,269.87	
1925		$20,995.68
1926		3,791.26
1926		
Totals	$101,269.87	$24,786.94

Reference is made to the conference held in this office with your representative, Mr. Morris L. Johnston, on May 29, 1928, in regard to the contentions as set forth in your letter dated May 2, 1928, relative to the proposed adjustments in your tax liability for the years 1924 to 1926, inclusive, as outlined in office letter of April 30, 1928.

You are advised that the inclusion of the dividends from the United States Gypsum Company in your gross income for the years in which such dividends were declared and made payable on the grounds of constructive receipt, rather than the years in which such dividends were actually reduced to possession, as claimed by you, is strictly in accordance with the consistent rulings of this office with respect to the question at issue. In this connection you are referred to Office Decision 97 reported in Internal Revenue Cumulative Bulletin, December 1919, Page 79 and Income Tax Unit Ruling 2072 reported in Internal Revenue Cumulative Bulletin III-2, Page 76. You are further informed that the Commissioner of Internal Revenue does not acquiesce in the adverse decisions of the United States Board of Tax Appeals as relied upon by you, namely:

Appeal of Robert W. Bingham, 8 B. T. A. 603,
Appeal of H. L. Campbell, 8 B. T. A. 1076,
Appeal of Adnah McMurtie, 8 B. T. A. 1301,
Appeal of Deposit Trust and Savings Bank, Executor, Estate of Enoch Stott, promulgated April 19, 1928, Docket #12195.

In view of the foregoing, your protest must be denied.

1924

Net income disclosed by your return		$116,936.54
Add:		
1. Dividends		266,490.10
Adjusted net income		$383,426.64
14 Less:		
Dividends	$364,340.05	
Personal exemption and credit for dependents	2,900.00	367,240.05
Income subject to normal tax		$ 16,186.59

Computation of Tax

Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $4,000.00		160.00
Normal tax at 6% on $8,186.59		491.39
Surtax on $383,426.64		124,556.39
Total tax		$125,287.59
Less:		
Earned income credit	$51.00	
Tax paid at source	1.10	52.10
Net tax assessable		$125,235.49
Tax previously assessed		23,965.62
Deficiency in tax		$101,269.87

Explanation of Change

1. This item represents a cash dividend declared and made payable by the United States Gypsum Company, on or before December 31, 1924, checks for which were prepared and mailed by the corporation to the various stockholders on that date. It is, therefore, held in accordance with Articles 52 and 1541 of Regulations 65 relating to the Revenue Act of 1924, that this cash dividend was unqualifiedly made subject to your demand on December 31, 1924, and is deemed to have been constructively received by you in the year 1924. In this connection you are informed that the decisions by the United States Board of Tax Appeals in the cases of Robert

W. Bingham and Adanah McMurtie, referred to in your protest of February 9, 1928, have not been acquiesced in by the Commissioner of Internal Revenue.

1925

Net income disclosed by your return		$569,959.67
Add:		
1. Dividends increased		161,511.70
Total		$731,471.37
Deduct:		
2. Dividends decreased		266,490.10
Adjusted net income		$464,981.27
Less:		
Dividends	$417,653.60	
Personal exemption and credit for dependents	3,900.00	421,553.60
Income subject to normal tax		$ 43,427.67

Computation of Tax

Normal tax at 1½% on $4,000.00		$ 60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $35,427.67		1,771.38
Surtax on $464,981.27		84,656.25
Total tax		$ 86,607.63
Less:		
Earned income credit	$201.25	
Tax paid at source	0.50	201.75
Net tax assessable		$ 86,405.88
Tax previously assessed		107,401.56
Overassessment		$ 20,995.68

Explanation of Charges

1. This item represents a cash dividend declared and made payable by the United States Gypsum Company on or before December 31, 1925, and has been included in the gross income for the year 1925 for the reason explained under Explanation #1 for the year 1924.

2. This dividend has been included in the gross income for the year 1924 and is, therefore, deducted here.

1926

Total net income disclosed by your return		$471,044.88
16 Add:		
1. Dividends increased	$140,117.30	
2. Contributions disallowed	2,100.00	
3. Increases in profit from sale of real estate	540.94	142,758.24
		$613,803.12
Deduction:		
4. Dividends decreased		161,511.70
Adjusted total net income		$452,291.42
Less:		
5. Capital net gain as corrected		1,189.28
Ordinary net income		$451,102.14
Less:		
Dividends	$453,722.26	
Interest on United States obligations	21.84	
Personal exemption and credit for dependents	3,900.00	457,644.10
Income subject to normal tax		None

Computation of Tax

Normal tax		None
Surtax on $451,102.14		$ 81,880.43
12½% tax on capital net gain of $1,189.28		148.66
Total tax		$ 82,029.09
Less:		
Earned income credit	$55.00	
Tax paid at source	0.50	55.50
Net tax assessable		$ 81,973.59
Tax previously assessed		85,764.85
Overassessment		$ 3,791.26

Explanation of Changes

1. This item represents a cash dividend declared and
17 made payable by the United States Gypsum Company on or before December 31, 1926, which has been included in the gross income for the year 1926 for the reason explained under Change #1 for the year 1924. Articles 52 and 1541 of Regulations 69 are applicable to this year.

2. The following contributions have been disallowed as deductions from the gross income for the year 1926 for the reason that they were not made to organizations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual:

Chicago Crime Commission	$1,000.00
Chicago Bureau of Public Efficiency	500.00
Plant of Chicago (Commercial Club)	500.00
Port of Chicago (Commercial Club)	100.00
Total contributions disallowed	$2,100.00

3. This adjustment is explained as follows:

Cost of land purchased by you in 1919	$1,059.06
Selling price received in 1926	1,600.00
Profit taxable in 1926	$ 540.94

4. This dividend was included in the gross income for the year 1925 and is, therefore, deducted here.

5. The correct capital net gain is as follows:

Amount reported in Schedule D of your return	$ 648.34
Increase explained under Change #3 above	540.94
Corrected capital net gain	$1,189.28

The overassessments shown herein will be made subjects of Certificates of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with Section 284 of the Revenue Act of 1926.

The right of petition as indicated on Page 1 of this letter refers only to any deficiency in tax indicated herein, inasmuch as there is no provision in the Revenue Act of 1926 grant-
18 ing the right of petition against the determination of any overassessment found upon a review of your return.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

emb-1

8 EXHIBIT B.

Excerpts of the Minutes of Regular Meeting of the Board of Directors of the United States Gypsum Company, Held at the Office of the Company, 205 West Monroe Street, Chicago, Illinois, on Wednesday, November 12, 1924, at 10:15 o'Clock A. M.

Resolved: That an amount equal to 1¾% on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account, and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1924.

Be It Resolved, That an amount equal to two (2%) per cent on the common stock outstanding at the close of business on December 5, 1924 be transferred to the dividend account as a regular cash dividend, and that this amount be paid to the common Stockholders of record at the close of business on that date, on or before December 31, 1924.

Be It Further Resolved, That an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account, and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924.

9 Excerpts of the Minutes of Regular Meeting of the Board of Directors of the United States Gypsum Company, Held at the Office of the Company, 205 West Monroe Street, Chicago, Illinois, on Thursday, November 12, 1925, at 10:00 o'Clock A. M.

Resolved: That an amount equal to 1¾% on the preferred stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account, and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1925.

Resolved, That an amount equal to 2% on the common stock

outstanding at the close of business on December 5, 1925 be transferred to the dividend account as a regular cash dividend, and that this amount be paid to the common Stockholders of record at the close of business on that date, on or before December 31, 1925.

Resolved, That an amount equal to $2.00 per share on the common stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account, and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1925.

10 Excerpts of the Minutes of the Regular Meeting of the Board of Directors of the United States Gypsum Company, Held at the Office of the Company, 205 West Monroe St., Chicago, Illinois, on Wednesday November 10th, 1926, at 10:00 A. M.

Resolved: That an amount equal to 1¾% on the preferred stock outstanding at the close of business on December 4th, 1926, be transferred to the dividend account, and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1926.

Resolved: That an amount equal to 2% on the common stock outstanding at the close of business on December 4th, 1926 be transferred to the dividend account as a regular cash dividend, and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1926.

Resolved, That an amount equal to $1.40 per share on the common stock outstanding at the close of business on December 4, 1926, be transferred to the dividend account, that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1926.

11 MORRIS L. JOHNSTONE
Counsel for Petitioner
134 South LaSalle Street, Chicago, Illinois

State of Illinois }
County of Cook } ss.

SEWELL LEE AVERY, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true except as to those facts stated to be upon information and belief, and those facts he believes to be true.

SEWELL LEE AVERY

Subscribed and Sworn To before me this 11th day of August, A. D. 1928.

HAROLD D. BURGESS
Notary Public

(Seal)

19 (Caption 40238)

ANSWER.

nent of
lence, filed
e 3, 1933.

Filed Oct. 6, 1928.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1, 2. Admits the allegations in paragraphs 1 and 2.

3. Admits that the taxes in controversy are individual income taxes of the petitioner for the calendar year 1924. Denies the remaining allegations in paragraph 3 and says that the Board has no jurisdiction over the years 1925 and 1926 for the reason that it appears from the petition and exhibits annexed thereto that no deficiency has been asserted for those years.

5, (a), (b), (c), (d) For lack of information upon which to base a belief, denies the allegations in paragraphs 5, (a), (b), (c) and (d).

5, (e) Admits that on to wit: March 15, 1925, petitioner filed with the Collector of Internal Revenue for the First District of Illinois, what purports to be an income tax return for the calendar year 1924. Denies the remaining allegations in paragraph 5, (e).

5, (f) Admits that the amount shown as net income on said

return for the year 1924 was $116,936.54. Denies the remaining allegations in paragraph 5, (f).

5, (g) For lack of information upon which to base a belief, denies the allegations in paragraph 5, (g).

5, (h) Denies the allegations in paragraph 5, (h).

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the petition be denied.

(Signed) C. M. CHAREST
General Counsel, Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney, Bureau of Internal Revenue.

jdf/10/5/28

ient of ence, filed e 3, 1933.

47 (Caption)

I

STATEMENT OF EVIDENCE.

Filed June 3, 1933.

The following is a statement of all of the evidence submitted to the Board of Tax Appeals in the above named case reduced in narrative form.

The following facts were stipulated:

1. The petitioner in the above cause is an individual and at all material times herein is and was a citizen of the United States and a resident of the City of Evanston, County of Cook and State of Illinois.

2. Petitioner is and at all material times herein was, a stockholder of United States Gypsum Company, an Illi-
48 nois corporation with its principal office at No. 300 West Adams Street, Chicago, Illinois, formerly No. 205 West Monroe Street, Chicago, Illinois, owning a minority number of the preferred and common shares of the capital stock of said corporation. Petitioner is and at all of said times was President of said corporation.

3. Petitioner has always kept his accounts and has reported his income upon a cash receipts and disbursements basis and upon a calendar year basis.

4. The Commissioner has determined a deficiency for the year 1924 of $101,269.27, an overassessment for the year 1925 of $20,995.68, an overassessment for the year 1926 of $3,791.26 and a deficiency for the year 1929 of $2,658.13.

5. In determining the said deficiency of $101,269.27 for the year 1924, the Commissioner increased the taxable income reported by the petitioner for said year by the amount of $266,490.10, representing certain dividends received by the petitioner as a stockholder of said United States Gypsum Company.

6. The said dividends of $266,490.10 were paid pursuant to a resolution of said corporation duly adopted on
49 November 12, 1924, residing as follows:

"Resolved that an amount equal to one and three-quarters (1¾%) per cent. on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an amount equal to two (2%) per cent. on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924.

The said dividends of $266,490.10 were reported by the petitioner in his income tax return for the calendar year 1925.

7. On November 12, 1925, the said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 1-3 4% on the preferred stock outstanding at the close of business on December 5, 1925 be transferred to the dividend account and that this amount be paid to the preferred stockholders of record
50 at the close of business on that date, on or before December 31, 1925;

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 5,

1925 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1925;

"Resolved that an amount equal to $2.00 per share on the common stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1925."

Petitioner received dividends from said corporation, amounting to $161,511.70, pursuant to the last mentioned resolution. Petitioner reported the amount of said dividends in his tax return for the year 1926.

8. In determining the overassessment of $20,995.68 for the year 1925, the Commissioner increased petitioner's taxable income for said year by the amount of said dividends of $161,511.70, and decreased petitioner's taxable income by the amount of said dividends of $266,490.10.

9. On November 10, 1926, the said United States Gypsum Company adopted the following resolution:

"Resolved that an amount equal to 1-3/4% on the preferred stock outstanding at the close of business on December 4th, 1926, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1926;

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 51 4th, 1926, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1926;

"Resolved that an amount equal to $1.40 per share on the common stock outstanding at the close of business on December 4, 1926, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1926.

Petitioner received dividends amounting to $140,117.30 from said corporation pursuant to said last mentioned resolution, which said dividends were included by the petitioner in his return for the year 1927.

10. In determining the said overassessment for the year

1926, amounting to $3,791.26, the Commissioner increased the petitioner's taxable income for 1926 by the amount of said dividends of $140,117.30 and decreased the petitioner's taxable income by the amount of the said dividends of $161,511.70.

11. On November 14, 1928, the said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1928;

52 "It Is Also Resolved that for the purpose of the foregoing the stock books be closed for the transfer of common stock from the close of business on December 15, 1928 to December 31, 1928."

Petitioner received dividends amounting to $32,656 from said corporation under the last mentioned resolution.

12. On November 13, 1929, said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929;

"It Is Also Resolved that for the purpose of the foregoing, the stock books be closed for the transfer of common stock from the close of business on December 14, 1929 to December 31, 1929, inclusive."

Petitioner received dividends amounting to $48,984 from said corporation pursuant to said last mentioned resolution.

13. In determining the deficiency for the said year 1929, amounting to $2,658.13, the Commissioner increased the petitioner's taxable income by the amount of said dividends of $48,984.00 and decreased the petitioner's taxable

53 income by the amount of said dividends of $32,656. Petitioner included the said dividends of $48,984.00 in his return for the year 1930 and had included the said dividends of $32,656.00 in his return for the year 1929.

14. The said dividends of $266,490.10 received by the petitioner pursuant to the resolution adopted on November 12, 1924, were paid to the petitioner by the check or checks of

said United States Gypsum Company, which checks were actually received by the petitioner in January, 1925, on, to-wit, January 2, 1925. The said dividends of $161,511.70 received pursuant to the resolution of November 12, 1925 were paid to the petitioner by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1926, on, to-wit, January 2, 1926. The said dividends of $140,117.30 received by the petitioner pursuant to the resolution of November 10, 1926 were paid by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1927, on, to-wit, January 2, 1927. The said dividends of $32,656.00 received by the petitioner pursuant to said resolution of November 14, 1928 were paid by the check or checks of said corporation, which checks were actually received by the petitioner in January, 1929, on, to-wit, January 2, 1929. The said dividends of $48,984.00
54 received by the petitioner pursuant to the resolution of November 13, 1929 were paid by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1930, on, to-wit, January 2, 1930.

Thereupon MR. GEORGE W. CLARKE, a witness called by and on behalf of the petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination.

My name is George W. Clarke. I reside at 4417 Wrightwood Avenue. I am Assistant Treasurer of United States Gypsum Company, and have been since 1920. The matter of sending out dividend checks for distribution was handled in my department, the treasury department. The practice, methods and procedure of United States Gypsum Company with reference to sending out dividend checks during the period from 1924 to 1930, both inclusive, is as follows:

The treasury department receives a complete list of the stockholders from the secretary, indicating the number of shares, the address of the stockholders and the amount in dividends. On receipt of that list the treasury department
55 turns over the dividend checks in blank to the addressograph department which department imprints upon the checks, from the stockholders' list, the name and address

of the stockholder. The checks are then re-delivered to the treasury department where they are signed but without the amount. The check numbers are then imprinted on the stockholders' list. The checks are then filled in and signed, whereupon they are totalled and balanced with the dividend list. After they are balanced, the checks, which are in sheets of five, are torn apart, are dated and inserted in the envelopes. They are then mailed on the last business day of the month, it has always been the 31st or 30th, depending on the month, the number of days in the month, and the checks are always turned over to the mailing department in the afternoon, usually anywhere from 1:00 to 3:00 o'clock.

The mailing department seals the envelopes, imprints the permit number on the envelope for mailing and, in many cases, they are carried over to the post office; many times it has been necessary for them to work until 6:00 or 7:00 o'clock and then carry them to the post office.

Sometimes they are taken over by the mail delivery man, not the mail man, but a trucking company that carries our mail to the post office. There have been occasions when they have been carried to the post office in a taxicab, when they worked overtime. I don't think they ever left the company's office before about 6:00 o'clock.

The list is usually received from the secretarial department anywhere from the 20th to the 22nd of the month and of course the work of the treasury department starts when the list is received from the secretarial department.

During the years 1924 to 1929, the dividend checks have never left the treasury department until the afternoon of the last day of the month.

There are a few dividend checks not sent out through the mail. I would say approximately fifty stockholders who are employees of the company; they work right in the Chicago general office, and those checks always have been, since I have ever had anything to do with the dividends, held in the office until the first business day of the next month and then distributed to the employees through the office mail.

Mr. Avery's dividend checks have always been delivered to his secretary on the first day of the following month. The practice to which I have been testifying has continued ever since I have been assistant treasurer.

57 *Cross-Examination.*

In the case of a dividend declared to be payable on or before December 31st of a certain year, Mr. Avery's check would always be delivered on the first business day of the following month. That is very definitely true, to my own personal knowledge, with reference to the years here under consideration—1924 to 1929. That has always been the fact. There has been no exception with regard to any stockholder, whether or not he be an employee or officer of the company. None received their checks before the first business day following the month in which they are made payable. That is the practice.

Our dividends are quarterly dividends and are always payable on or before the last day of the month, the 30th or 31st, whichever it happens to be. In the cases referred to as being on or before the 30th, that would always be the last day of the month. If there were thirty days in the month, the resolution would be on or before the 30th of the month, and if thirty-one days in the month, the resolution read payable on or before the 31st of December. It has always been the practice to mail the dividend checks on the last day of the month so that they would be in the stockholders' hands on the first business day of the month.

58 Thereupon MR. A. W. IRWIN, called as a witness by and on behalf of the petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination.

My name is A. W. Irwin. I reside at 7726 North Ashland Avenue, Chicago. I am employed by United States Gypsum Company, in charge of the secretarial department. I have been occupying that position since August 1, 1931. I have been working on the books in the secretarial department since August 1, 1931.

I have made an examination of the books as to the amount of stock of United States Gypsum Company and the amount of Mr. Avery's holdings on the various dates mentioned in these resolutions.

The total common and preferred stock outstanding and Mr. Avery's holdings on the dates mentioned are as follows:

Date	Common Shares	Pref. Shares	Mr. Avery's Holdings Common	Preferred
Dec. 5, 1924	325,397	84,649	48,604	2,302
Dec. 5, 1925	440,723	82,772	65,618	2,302
Dec. 15, 1928	760,436	77,281	81,640	2,306
Dec. 14, 1929	1,149,315	75,417	122,460	2,306

59 There was no cross-examination of the witness.

No further testimony was offered by either the petitioner or the respondent.

Thereupon counsel for the respondent stated that he was willing to concede that the facts were as testified to by Mr. Clarke.

May 10, 1933.

LELAND K. NEEVES,
Attorney for Petitioner.

60 Approved and Ordered Filed this 3rd day of June, 1933. C. M. Trammell Member (s).

21 * * (Caption 40238 and 62783) * *

Docket Nos. 40238
62783

Leland K. Neeves, Esq., for the petitioner.
Chester A. Gwynn, Esq., for the respondent.

MEMORANDUM OPINION.

Trammell: In the petitions filed in these proceedings, which were consolidated for hearing, the petitioner alleges error on the part of the respondent in determining deficiencies and overassessments as follows:

Docket No.	Year	Deficiency	Overassessment
40238	1924	$101,269.87	
	1925		$ 20,995.68
	1926		3,791.26
62783	1929	2,658.13	

Inasmuch as the respondent has not determined deficiencies in tax for 1925 and 1926 we do not have jurisdiction with
22 respect to such years. The proceeding in Docket No. 40238 will be dismissed in so far as it relates to a deter-

mination of the petitioner's tax liability for those years. *Cornelius Cotton Mills*, 4 B. T. A. 255.

The only matter presented for determination with respect to the years 1924 and 1929 is the correctness of the respondent's action in including in the petitioner's taxable income for such years certain dividends on corporate stock owned by the petitioner which were declared in such years, which were payable on December 31 of such years and checks for which were not actually received by petitioner until January 2 of the years following. In addition to certain testimony the proceedings were submitted on a stipulation of facts, pertinent portions of which are as follows:

> The petitioner in the above causes is an individual and at all material times herein is and was a citizen of the United States and a resident of the City of Evanston, County of Cook and State of Illinois.
>
> Petitioner is and at all material times herein was, a stockholder of the United States Gypsum Company, an Illinois corporation with its principal office at No. 300 West Adams Street, Chicago, Illinois, formerly No. 205 West Monroe Street, Chicago, Illinois, owning a minority number of the preferred and common shares of the capital stock of said corporation. Petitioner is and at all of said times was President of said corporation.
>
> Petitioner has always kept his accounts and has reported his income upon a cash receipts and disbursements basis and upon a calendar year basis.
>
> The Commissioner has determined a deficiency for the year 1924 of $101,269.27, * * * and a deficiency for the year 1929 of $2,658.13.
>
> In determining the said deficiency of $101,269.27 for the year 1924, the Commissioner increased the taxable income reported by the petitioner for said year by the amount of $266,490.10, representing certain dividends received by the petitioner as a stockholder of said United States Gypsum Company.

23 The said dividends of $266,490.10 were paid pursuant to a resolution of said corporation duly adopted on November 12, 1924, reading as folllows:

> "RESOLVED that an amount equal to one and three-quarters (1¾%) per cent. on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close

of business on that date, on or before December 31, 1924;

"BE IT FURTHER RESOLVED that an amount equal to two (2%) per cent. on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1924;

"BE IT FURTHER RESOLVED that an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924.

The said dividends of $266,490.10 were reported by the petitioner in his income tax return for the calendar year 1925.

* * * * * * *

On November 14, 1928, the said United States Gypsum Company duly adopted the following resolution:

"RESOLVED that an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1928;

"IT IS ALSO RESOLVED that for the purpose of the foregoing the stock books be closed for the transfer of common stock from the close of business on December 15, 1928 to December 31, 1928."

Petitioner received dividends amounting to $32,656.00 from said corporation under the last mentioned resolution.

24 On November 13, 1929, said United States Gypsum Company duly adopted the following resolution:

"RESOLVED that an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929;

"IT IS ALSO RESOLVED that for the purpose of the fore-

going, the stock books be closed for the transfer of common stock from the close of business on December 14, 1929 to December 31, 1929, inclusive."

Petitioner received dividends amounting to $48,948.00 from said corporation pursuant to said last mentioned resolution.

"In determining the deficiency for the said year 1929, amounting to $2,658.13, the Commissioner increased the petitioner's taxable income by the amount of said dividends of $48,984.00 and decreased the petitioner's taxable income by the amount of said dividends of $32,656. Petitioner included the said dividends of $48,984.00 in his return for the year 1930 and had included the said dividends of $32,656.00 in his return for the year 1929.

The said dividends of $256,490.10 received by the petitioner pursuant to the resolution adopted on November 12, 1924, were paid to the petitioner by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1925, on, to-wit, January 2, 1925. * * * The said dividends of $32,656.00 received by the petitioner pursuant to said resolution of November 14, 1928 were paid by the check or checks of said corporation, which checks were actually received by the petitioner in January, 1929, on, to-wit, January 2, 1929. The said dividends of $48,984.00 received by the petitioner pursuant to the resolution of November 13, 1929 were paid by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1930, on, to-wit, January 2, 1930.

The practice followed by the United States Gypsum Company in the distribution of its dividend checks for the
25 years 1924 through 1929 was as follows: The treasurer's department which has supervision of the matter received from the secretary a complete list of the stockholders, showing the number of shares and the addresses of the stockholders and the amounts to which they were entitled. Upon receipt of the list, the treasurer's department turned over to the addressograph department blank checks upon which were printed the names of the stockholders respectively and their addresses. The checks were then returned to the treasurer's department. The checks were then signed with the amount of the check still in blank and the check numbers were imprinted upon the stockholders' list. The amount of each

check was then filled in and the checks were totalled and balanced with the dividend list. They were then separated, the checks up to that time being in sheets of five, were dated and inserted in their envelopes.

The checks were turned over to the mailing department in the afternoon anywhere from one to three o'clock. The mailing department sealed the envelopes, stamped the permit number on the envelopes for mailing, and took the envelopes to the post office. The checks never left the mailing department before six o'clock. In many instances it was necessary for the mailing department to work until six or seven o'clock and then take the checks to the post office. Usually the envelopes containing the checks were taken to the post office by a trucking company that took the company's mail to the post office and upon some occasions when the mailing department had worked overtime, the checks were taken to the post office in a taxi cab.

26 The stockholders' or dividend list was usually received from the secretarial department by the treasurer's department anywhere from the 20th to the 22nd of the month. The work of the treasurer's department started when the list was received from the secretarial department. The dividend checks never left the treasurer's office or were sent to the mailing department until the afternoon of the last day of the month, and the checks were mailed on the last day of the month so as to be in the stockholders' hands on the first business day of the following month.

Dividends were payable quarterly and in every instance they were made payable on or before the last day of the month, the 30th or 31st, depending upon the month.

In the case of certain of the stockholders who were employees of the company, at the Chicago general office, including the petitioner, approximately fifty in number, the dividend checks were not mailed but were held in the treasurer's office until the first business day of the following month and were then distributed to the employees through the office mail. The petitioner's dividend checks were always delivered to his secretary on the first business day of the following month. The practice was without exception that no stockholder, whether employee or officer, receive his check before the first business day of the month following the month in which the dividends were made payable.

27 The number of shares of stock of the United States Gypsum Company outstanding and the number of shares

owned by the petitioner were as follows on the dates indicated:

Date	Common Stock Shares Outstanding	Common Stock Shares Owned by Petitioner	Preferred Stock Shares Outstanding	Preferred Stock Shares Owned by Petitioner
Dec. 5, 1924.....	325,397	48,604	84,649	2,302
Dec. 5, 1925.....	440,723	65,618	82,772	2,302
Dec. 15, 1928.....	760,436	81,640	77,281	2,306
Dec. 14, 1929.....	1,149,315	122,406	75,417	2,306

The petitioner contends that under the circumstances here presented the respondent erred (1) in including in taxable income for 1924 the dividends of $266,490.10 declared by the corporation on November 12, 1924 payable on or before December 31, 1924 to stockholders of record at the close of business on December 5, 1924 and the check or checks for which were not actually received by the petitioner until on January 2, 1925 and (2) in including in taxable income for 1929 the dividends of $48,984 declared by the corporation on November 13, 1929 payable on or before December 31, 1929 to stockholders of record at the close of business on December 14, 1929 and the check or checks for which were not received by the petitioner until on January 2, 1930. The respondent contends that his action was correct and should be sustained.

The petitioner contends that under the Revenue Acts of 1924, 1926 and 1928 the time of the actual receipt of dividends determines the year in which they are to be subject to
28 tax and that since the checks for the dividends in controversy were actually received by him in the years following those in which the respondent seeks to tax them the respondent's action should be reversed.

The pertinent provisions of the Revenue Act of 1924 are as follows:

> SEC. 213. For the purposes of this title * * *
>
> (a) The term "gross income" includes * * * income derived from * * * dividends * * * The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.
>
> SEC. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer;

In so far as here material the pertinent portions of the Revenue Acts of 1926 (Secs. 212 and 213) and 1928 (Sections 22, 41 and 42) are substantially the same as the foregoing provisions of the Revenue Act of 1924.

Respecting the time when dividends are to be included in gross income neither the Revenue Act of 1924 nor the subsequent Acts contain the same or a similar provision to that contained in section 201 (e) of the Revenue Act of 1921 to the effect that "a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands." The petitioner pointing to the omission in the later acts of the provision contained in section 201 (e) of the Act of 1921 and relying on the statements of the court in *Commissioner* v. *Cecil Q. Adams*, 54 Fed. (2d) 228, Circuit Court of Appeals, First Circuit, in affirming 20 B. T. A. 243 urges that we reconsider the decisions which we have rendered since our decision in the *Adams* case and which involved the time for including in income under the 1924 and later Acts dividends received under circumstances similar to those here presented.

In *Cecil Q. Adams*, *supra*, there was involved the question of the inclusion in the taxpayer's gross income for the calendar year 1924 the amount of a dividend which was declared on December 26, 1924 by a resolution which stated "Check for same to be mailed December 31, 1924" where the taxpayer, who kept his books and reported his income for each calendar year on the basis of cash received and disbursed, received a check for his dividend in due course on January 2, 1925. We there considered the legislative history relating to the omission from the Act of 1924 of the above quoted provision contained in section 203 (e) of the Revenue Act of 1921 and said:

> Clearly, Congress intended that even under the 1924 Act there might be a constructive receipt of dividends which would make such dividends taxable to the stockholder prior to the date upon which he actually received them. In this Act, Congress apparently abandoned a specific provision that all items of gross income would be taxable in the year in which unqualifiedly made subject to the demands of the taxpayer, because it considered that such would be the rule followed even in the absence of a statutory provision. In other words, Congress believed that there were some cases in which the courts

would and should hold that income was constructively received under well established rules of law and no enlargement of these rules was necessary. Each case in which the Commissioner attempts to apply the rule of constructive receipt will depend upon its own facts as to whether or not there is justification for the application of such a rule. But, in general, income should not be construed to have been received prior to the date of actual receipt except where a taxpayer turns his back upon income or does not choose to receive income which he could have if he chose. Cf. *John A. Brander, supra; Robert W. Bingham*, 8 B. T. A. 603.

Inasmuch as the resolution declaring the dividends expressly provided that checks should be mailed on December 31, 1924, as the language was purposely inserted in such resolution and as there was no other time of payment fixed and no other method of payment authorized we concluded that the dividend was not unqualifiedly subject to the demand of the taxpayer in 1924 and therefore was not to be included in the petitioner's taxable income for 1924.

In affirming our decision the Circuit Court of Appeals said:

> The Board of Tax Appeals in its opinion distinguished the present case from that of *Commissioner v. Bingham*, 35 Fed. (2d) 503, 281 U. S. 729, 50 S. Ct. 246, on the ground that the latter arose under the Revenue Act of 1921 (42 Stat. c. 136), which contained a provision in Sec. 201 (e) that dividends "shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands"; and on the further ground that the resolution, above referred to, fixed the time of payment as of December 31, 1924, and the method of payment to be by check, mailed on that day; and fixed no other time of payment and authorized no other method.
>
> The case of *Commissioner v. Bingham, supra*, is clearly distinguishable from the present one, for the reason that the tax there in question was governed by the Revenue Act of 1921, in which Sec. 201 (e) expressly provides that dividends "shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands," which provision the Act of 1924 does not contain.
>
> The Act of 1924 not only does not contain the above provision, but in Section 213 (a) expressly provides that

dividends "shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of Section 212," with which exception we are not concerned.

The applicable provisions of Section 213 (a) are not ambiguous; the language used clearly expresses the intention of Congress. Its intention, where the language of the Act is unambiguous and its meaning plain, is to be gathered from the Act itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this Act speaks
31 for itself; it does not call for construction. And on this ground alone, we think that the Board of Tax Appeals did not err in reaching the conclusion that it did.

We are also of the opinion that, on the facts found, the dividends were not "unqualifiedly made subject to the demand of the stockholder," in the year 1924, if Art. 52 of the Departmental Regulations can be said to be valid and not in conflict with the express language of Sec. 213 (a).

The petitioner contends that under the language used by the court there is no authority in the Revenue Acts of 1924, 1926 and 1928 for including in taxable income dividends received under the circumstances here involved.

Subsequent to our decision in the *Adams* case and prior to the affirmance thereof by the Circuit Court of Appeals we decided *Mary Miller Braxton*, 22 B. T. A. 182 which arose under the Revenue Act of 1926. The *Braxton* case involved the inclusion in income for 1927 by a taxpayer on the cash receipts and disbursements and calendar year basis of dividends declared in that year, the checks in payment of which were dated and mailed December 31, 1927 but not actually received by the taxpayer until January 2, 1928. After again reviewing the legislative history relating to the omission from the later Revenue Acts of the provisions contained in section 203 (e) of the Revenue Act of 1921 we said:

From these reports and the various stages of the bill, it is clear that the legislative intent was that gross income should continue to include the items covered by section 201 (e) of the 1921 Act, and that the general lan-
32 guage of the statute was sufficient to express this intent. We think the language of the 1924 and 1926 Acts is entirely susceptible of this construction, or, to put it

contrariwise, we think that the language used does not clearly exclude such items from gross income, and hence that the actual intention may properly be effectuated by the application of the general language to dividends, when subject to demand. These dividends were payable in 1927, and, as held generally in the *Bingham* case, *supra*, were, therefore, in the absence of evidence to the contrary, receivable by the stockholder on mere demand and hence constructively received.

In distinguishing our decision in that case from that in the *Adams* case we said:

> *Cecil Q. Adams*, 20 B. T. A. 243, contained an important difference—the dividend was only payable by a check to be mailed December 31, and hence the stockholder had no right to demand payment otherwise before receipt by mail.

Subsequent to the decision of the Circuit Court of Appeals in the *Adams* case we decided the case of *Effie B. Shearman*, 26 B. T. A. 716 which arose under the Revenue Act of 1928. There dividends were declared in 1928 payable on December 31, 1928 to stockholders of record "at the close of business on that day." Checks dated December 31, 1928 were mailed on that date to and were received on January 2, 1929 by the taxpayer who reported her income on the cash receipts and disbursements basis. Folllowing our decision in the *Braxton* case we held the dividends to be taxable in 1928.

Franklin J. Matchette, 26 B. T. A. 909 involved the question of the taxability in 1924 of dividends declared December 20, 1924, payable December 31, 1924 to stockholders of record on December 15, 1924 the check in payment of which was mailed on December 31, 1924 and received between January 2, and January 7, 1925 by the taxpayer who filed his returns on a cash receipts and disbursements basis. Following our decisions in the *Braxton* and *Shearman* cases we held the dividends to be taxable in 1924.

While we recognize that our holdings in the *Braxton*, *Shearman* and *Matchette* cases are not in harmony with some of the language used by the court in the *Adams* case we are, however, of the opinion that our view expressed in the *Braxton* case and followed in the later cases, "that the legislative intent was that gross income should continue to include the items covered by section 201 (e) of the 1921 Act" is sound and should continue to be followed. With due deference to

the view expressed by the Circuit Court of Appeals for the First Circuit in the *Adams* case we must say that our decisions are reviewable by all of the Circuit Courts of Appeal and until others speak on this question we do not feel that we should abandon the view which we have heretofore adopted and followed.

The facts in the instant proceedings are almost identical with those in the *Braxton, Shearman* and *Matchette* cases. In those cases checks for the dividends were mailed to the taxpayers. In these proceedings they were not mailed on December 31 of the respective years to the taxpayer, who according to the pleadings and stipulated facts had the same business address as the corporation, but were delivered to him the following business day through the "office mail." This difference is not material, for as was said in the *Matchette* case the voluntary mailing of a dividend check by
34 a corporation has no special legal significant. The dividends in controversy were declared in 1924 and 1929 respectively and were payable on December 31 of such years. On the dates the dividends were payable the petitioner had a legal right to demand and receive payment thereof in cash. The fact that he did not choose to exercise such right but waited for the delivery of checks to him in the following years did not in any wise destroy such right. *Commissioner v. Bingham*, 35 Fed. (2d) 503. On the facts before us we are of the opinion that the dividends were receivable by the petitioner on the dates payable. Being thus receivable on such dates they were constructively received by the petitioner during the taxable years in controversy and therefore were subject to tax in such years. We perceive no error in the respondent's action and accordingly it is sustained.

JUDGMENT WILL BE ENTERED FOR THE RESPONDENT.

Enter:

Entered Feb 2 1933

35 (Caption 40238) Entered 1933.

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered February 2, 1933, it is

Ordered and Decided: That there is a deficiency of $101,269.87 for the year 1924; and that the proceeding in so far

as it relates to the years 1925 and 1926 is hereby dismissed for want of jurisdiction.

Enter:

CHARLES M. TRAMMELL
(Signed) Charles M. Trammell
(Seal) *Member.*

Entered Feb 2 1933

25. 36 * * (Caption 40238) * *

PETITION FOR REVIEW OF BOARD DECISION.

Filed April 25, 1933.

Petition of Sewell Le Avery for Review by the United States Court of Appeals for the Seventh Circuit of a Decision by the United States Board of Tax Appeals.

Sewell Lee Avery, the petitioner in this cause, by Leland K. Neeves, counsel, hereby files his petition for a review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision by the United States Board of Tax Appeals rendered on February 2, 1933 in the above cause, determining a deficiency in the petitioner's federal in-
37 come taxes for the calendar year 1924, in the amount of $101,269.27, and respectfully shows:

I.

The petitioner is an individual and resides in the City of Evanston, County of Cook and State of Illinois, with his business address at No. 300 West Adams Street, Chicago, Illinois.

The petitioner being aggrieved by the said decision and final determination of the Board of Tax Appeals in the above entitled cause desires a review thereof in accordance with the provisions of the Revenue Act of 1926 as amended and/or applicable statutes by the United States Circuit Court of Appeals for the Seventh Circuit whereof the petitioner is an inhabitant.

II.

Nature of the Controversy.

The petitioner reported his income to the Commissioner of Internal Revenue for federal income tax for the year
38 1924 and all subsequent years on the calendar year basis and at all times material to this case, upon the cash receipts and disbursements basis.

At all material times herein, the petitioner was President of United States Gypsum Company, an Illinois corporation, and was a stockholder therein.

On November 12, 1924, United States Gypsum Company declared dividends upon its preferred and common stock, payable on or before December 31, 1924 to stockholders of record at the close of business on December 5, 1924. The resolutions declaring said dividends are as follows:

"Resolved that an amount equal to one and three-quarters (1¾%) per cent, on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an amount equal to two (2%) per cent. on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924."

39 Pursuant to said resolutions dividends aggregating $266,490.10 were paid to the petitioner, the checks therefor being actually received by him on January 2, 1925. These dividends were included in petitioner's income tax return for the calendar year 1925, the year in which the dividend checks were actually received by him, and were not included in petitioner's income tax return for the calendar year 1924.

On November 12, 1925, United States Gypsum Company declared dividends upon its preferred and common stock, payable on or before December 31, 1925, to stockholders of record at the close of business on December 5, 1925. The resolutions declaring said dividends were as follows:

"Resolved that an amount equal to 1¾% on the preferred stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1925:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1925;

"Resolved that an amount equal to $2.00 per share on the common stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1925."

Pursuant to said last named resolutions, dividends aggregating $161,511.70 were paid to the petitioner, the checks therefor being actually received by him on January 2, 1926. These dividends were included in petitioners' income tax return for the calendar year 1926, the year in which the dividend checks were actually received by him, and were not included in petitioner's income tax return for the calendar year 1925.

Similarly in subsequent years United States Gypsum Company declared dividends upon its preferred and common stock, said dividends being payable on or before December 31st of the respective years in which said dividends were declared. Petitioner received dividends pursuant to such resolutions and returned the same in his income tax return for the respective years in which the dividend checks were actually received by him.

Treating in each case the dividends so received by the petitioner as income for the year in which such dividends were respectively declared and by said respective resolutions made payable, and not as income for the respective years in which

the dividend checks were actually received by the peti-
41 tioner, respondent increased petitioner's 1924 income by the amount of the said dividends of $266,490.10, decreased his 1925 income by the amount of said last mentioned dividends and increased his said 1925 income by the amount of the said dividends of $161,511.70. Corresponding changes were made in subsequent years, respondent as to each year insisting on including the respective dividends as income for the year immediately prior to the year in which said dividends were respectively reported by the petitioner.

For convenience the following table shows the years for which the said respective dividends were reported by the petitioner and the years for which respondent insisted that said respective dividends be reported:

Year	Returns as Made	Returns as Adjusted
1924	.....	$266,490.10
1925	$266,490.10	161,511.70
1926	161,511.70	140,117.30
1927	140,117.30	.....
1928	.....	32,656.00
1929	32,656.00	48,984.00
1930	48,984.00	.....

The foregoing adjustments resulted in the asserted deficiency of $101,269.27 for 1924, overassessments of $20,995.68 and $3,791.26 for 1925 and 1926, respectively, and an
42 asserted deficiency of $2,658.13 for 1929. The said last named deficiency has also been sustained by the Board of Tax Appeals in Docket No. 62,783, and its determination thereof is the subject-matter of a separate petition for review.

The petitioner's income tax returns for the years 1927 and 1928, involving the same issue as to whether dividends should be reported by the petitioner in the year in which actually received by him or in which by the resolutions declaring the same they were made payable, are pending before the Department undetermined.

During all of the times material to this case the established practice and custom of United States Gypsum Company in the preparation and sending out of its dividend checks was such as to preclude the receipt by any stockholder of his dividend check or checks until on or after the first business day

of the calendar month next succeeding the date on or before which, according to the resolutions, the respective dividends were payable. All dividends were payable quarterly and were made payable or on or before the 30th or 31st day of the last calendar month, depending upon the month, of the quarterly period. In the case of the dividends here involved and in the case of all dividends which were payable on or before December 31st of any year, the preparation and sending out of the dividend checks was such as to preclude any stockholder from receiving his dividend check or checks until January 2nd of the year next following. That the stockholders, including the petitioner, did not receive the dividend checks until the first business day of such succeeding calendar month was therefore due to the established practice and custom and action of the company and not in any way to any voluntary act on the part of the stockholders.

43 On December 5, 1924, the total outstanding common stock of the company was 325,397 shares (par value $20) and the total outstanding preferred stock was 84,649 shares (par value $100). At the close of business on the same day, the petitioner owned 48,604 shares of common stock and 2,302 shares of preferred stock. On December 5, 1925, the total outstanding common stock of the company was 440,723 shares and the total outstanding preferred stock was 82,772 shares. At the close of business on said last mentioned date, the petitioner owned 65,618 shares of common stock and 2,302 shares of preferred stock.

As heretofore stated, the Commissioner included the said dividends of $266,490.10 in petitioner's income for 1924 and excluded them from petitioner's income for 1925 in which petitioner had included them. He included said dividends of $161,511.70 in petitioner's income for 1925 and excluded them from petitioners' income for 1926 in which petitioner had included them. The Commissioner at the same time increased petitioner's income for 1926 by the amount of the dividends of $144,117.30 which petitioner had included in his income for 1927 because the dividend checks therefor were actually received by him on January 2, 1927.

The petitioner thereupon filed his petition with the United States Board of Tax Appeals, contending that the said

44 dividends of $266,490.10 constituted income for the year 1925 in which year the dividend checks were actually received by him and did not constitute income for the calendar

year 1924 as claimed by the Commissioner. But the Board of Tax Appeals by its opinion and order of February 2, 1933, sustained the claims of the Commissioner and held said dividends to be taxable income for 1924. The Board of Tax Appeals determined the deficiency accordingly.

III.

Assignm of err

Assignments of Error.

The petitioner assigns error as to the following acts and omissions of the Board of Tax Appeals:

(1) That the Board of Tax Appeals erred in holding that said dividends amounting to $266,490.10, the dividend checks for which were not actually received by the petitioner until January 2, 1925, constituted taxable income for the calendar year 1924.

(2) That the Board of Tax Appeals erred in not holding that said dividends of $266,490.10 constituted taxable net income for the calendar year 1925.

(3) That the Board of Tax Appeals erred in holding that said dividends of $266,490.10 were constructively re-
45 ceived by the petitioner in 1924.

(4) That the Board of Tax Appeals erred in determining a deficiency against the petitioner in said sum of $101,269.27, or in any sum whatsoever.

(5) That the Board of Tax Appeals erred in not entering judgment for the petitioner.

(6) That the Board of Tax Appeals erred in entering judgment for the respondent.

LELAND K. NEEVES,
Attorney for Sewell Lee Avery,
134 South La Salle Street,
Chicago, Illinois.

46 United States of America
State of Illinois
County of Cook } ss.

LELAND K. NEEVES being first duly sworn, deposes and says that he is counsel of record for the petitioner in the above named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said

petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief; and that said petition is filed in good faith.

LELAND K. NEEVES.

Subscribed and Sworn to before me this 22nd day of April, 1933.

(Notarial Seal) BLANCHE E. NOVAK.

My Commission expires May 15, 1933.

June 1933. 63 * * (Caption 40238) * *

ORDER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to July 31, 1933.

(Signed) LOGAN MORRIS,
Member.

Dated Washington, D. C.,
June 19, 1933.

ne 2, 61 * * * (Caption 40238) * *

PRAECIPE FOR RECORD.

Filed June 2, 1933.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:
(a) Petition for redetermination.
(b) Answer of the respondent.
62 (3) Memorandum opinion of the Board of Tax Appeals.
(4) The decision of the Board.
(5) The petition for review, filed by the petitioner in the above cause.
(6) The statement of evidence.
(7) This Praecipe.
(8) All orders for the enlargement of the time for the transmission and delivery of the above mentioned documents. Not included in Transcript.

LELAND K. NEEVES,
Attorney for Petitioner.

May 27th, 1933.

Personal service of a copy of the foregoing praecipe for record is hereby acknowledged this 2nd day of June, 1933.

(Sgd.) C. M. CHAREST,
General Counsel; Bureau of Internal Revenue, Counsel for Respondent.

64 (Caption 40238)

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 62, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 10th day of July, 1933.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

(Seal)

Sewell L. Avery, *Petitioner,*		
v.	}	Docket No. 62783.
Commissioner of Internal Revenue, *Respondent.*		

Appearances:

For Taxpayer: Leland K. Neeves, Esq.

For Comm'r.: Chester A. Gwinn, Esq.

DOCKET ENTRIES.

1932

Mar. 14—Petition received and filed. Taxpayer notified. (Fee paid)

Mar. 14—Copy of petition served on General Counsel.

May 13—Answer filed by General Counsel.

May 25—Copy of answer served on taxpayer. General Calendar.

Jul. 12—Hearing set for week of September 6, 1932 at Chicago, Ill.

Sep. 19—Hearing had before Mr. Trammell, Div. 2. Called on merits. Stipulation of facts filed. Petitioner's brief due in 2 weeks—Commissioner's brief two weeks after petitioner's. Two weeks for petitioner's reply. Calendar call Sept. 6, 1932.

Oct. 3—Brief filed by taxpayer.

Oct. 11—Transcript of hearing of Sept. 19, 1932 filed.

Oct. 31—Motion for extension to Nov. 14, 1932 to file brief and to Nov. 30, 1932 to file reply filed by General Counsel. 11/1/32 granted.

Nov. 14—Brief filed by General Counsel.

Nov. 29—Reply brief filed by taxpayer. 12/2/32 copy served.

1933

Feb. 2—Memorandum opinion rendered, Charles M. Trammell, Div. 2. Judgment will be entered for the respondent.

Feb. 2—Decision entered, Charles M. Trammell, Div. 2.

Feb. 27—Motion for review by the entire Board filed by taxpayer.

Feb. 27—Order denying motion for review entered.

Mar. 6—Motion to fix amount of bond, filed by taxpayer.

Mar. 8—Order fixing amount of bond at $162,000. entered.

Apr. 18—Supersedeas bond in the amount of $162,000 approved and ordered filed.

Apr. 25—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Apr. 26—Proof of service filed by taxpayer.

May 26—Statement of evidence lodged.

May 29—Notice of motion to settle evidence June 7, 1933 filed by taxpayer.

Jun. 1—Notice of agreement with statement of evidence filed by General Counsel.

Jun. 2—Motion to settle statement of evidence filed by taxpayer.

Jun. 2—Praecipe of record with proof of service filed by taxpayer.

Jun. 3—Statement of evidence approved and ordered filed.

Jun. 19—Order enlarging time to July 31, 1933 for transmission and delivery of record entered.

2 UNITED STATES BOARD OF TAX APPEALS.

Sewell L. Avery,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 62783.

PETITION.

Filed March 14, 1932.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols AT:AR:D-1, ARS-60D) dated January 29, 1932, and as the basis of his proceeding alleges as follows:

1. Petitioner is an individual with address at 300 West Adams Street, Chicago, Illinois.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit 1, was mailed to the petitioner on January 29, 1932, as the petitioner believes.

3 3. The taxes in controversy are income taxes for the year 1929. The deficiency asserted is $2,658.13, the whole amount of which is in controversy.

4. The determination of the tax as set forth in said notice of deficiency is based upon the following errors:

(a) In determining the taxable net income of the petitioner for the year 1929, the Commissioner erroneously included certain dividends, amounting to $48,984.00, declared and paid by the United States Gypsum Company, which dividends were received by the petitioner in 1930 and not in 1929, and in the same connection excluded certain dividends, amounting to $32,656.00, declared and paid by United States Gypsum Company, which dividends were in fact received by the petitioner in 1929.

The said dividends of $48,984.00 paid to the petitioner, were paid by said United States Gypsum Company pursuant to a resolution, copy of which is attached hereto and marked Exhibit 2.

(b) The Commissioner has erroneously increased the petitioner's taxable net income for the year 1929 by the amount of the difference between said dividends of $48,984.00 and said dividends of $32,656.00.

(c) The Commissioner has erroneously increased the petitioner's income tax payable with respect to the year 1929 by the said sum of $2,658.13 which said latter sum is the net increase in income tax resulting from the inclusion of said $48,984.00 of dividends in the petitioner's taxable income for 1929 and the exclusion of the said dividends of $32,656.00 therefrom.

5. The facts upon which the petitioner relies are as follows:

(a) Petitioner is an individual stockholder in United States Gypsum Company, an Illinois corporation, with its principal office in the City of Chicago, County of Cook and State of Illinois, of which corporation the petitioner at all times herein mentioned was a minority stockholder.

(b) The said United States Gypsum Company, by a resolution of its Board of Directors duly adopted on, to-wit, November 13, 1929, directed that a dividend be paid equal to two per cent (2%) on its common stock outstanding at the close of business on December 14, 1929, payable to the common stockholders of record at the close of business on said date, on or before December 31, 1929, all as is more particularly shown in the said resolution, copy of which is attached hereto and marked Exhibit 2, as has been hereinbefore stated. The said common stock is of the par value of Twenty Dollars ($20) per share.

(c) Petitioner at the close of business on said December 14, 1929, was the owner of 122,460 shares of the common stock of said United States Gypsum Company, and the dividends payable thereon under the aforesaid resolution amounted to the said sum of $48,984.00. Petitioner, by reason of his ownership of said shares of common stock, was paid the said sum of $48,984.00 as dividends thereon.

(d) The dividend checks of the said United States Gypsum Company in payment of the dividends declared as set forth in the said resolution, were mailed from the office of the said United States Gypsum Company to its various stockholders on December 31, 1929. The dividend checks for the amount of the dividends payable to the petitioner, pursuant to the said resolution, were actually received by petitioner in January, 1930 and no part of said dividends were received by the petitioner in 1929.

(e) The petitioner duly filed his income tax return for the year 1929 and included therein as part of his taxable net income for said year, the said dividends amounting to $32,656.00 received by the petitioner in January, 1929, on account of dividends declared by the said United States Gypsum Company in 1928, pursuant to a resolution duly adopted by the Board of Directors of said company on, to-wit, November 14, 1928, a copy of which is attached hereto and made a part hereof and marked Exhibit 3, but did not include therein the said dividends amounting to $48,984.00 so received by the petitioner in January, 1930. The dividend checks of the said United States Gypsum Company in payment of the said dividends so declared on November 14, 1928 were mailed from the office of the said United States Gypsum Company to its various stockholders on December 31, 1928. The dividend checks, aggregating the said sum of $32,656.00 and representing the dividends payable to the petitioner pursuant to said resolution, were actually received by the petitioner in January, 1929.

(f) The petitioner in his tax returns for the years prior to 1929, and for the years subsequent thereto, as well as for the year 1929, included as part of his taxable net income only the dividends from said United States Gypsum Company actually received by him in the year with respect to which his return was filed. The petitioner at all times herein mentioned, and especially with respect to the year 1929, kept his books and accounts upon a "cash receipts and disbursements" basis and not upon an "accrual" basis, and has filed his income tax returns upon the said basis of cash receipts and disbursements

and not upon an accrual basis, and has kept his books and accounts and filed his income tax returns for all of said years upon a calendar year basis.

(g) The petitioner relies upon the appropriate provisions of the Revenue Act of 1928 and upon the ground that
6 neither the said dividends amounting to $48,984.00, nor the checks of the said United States Gypsum Company in payment thereof, were received by the petitioner in 1929, but on the contrary were received by the petitioner in the calendar year 1930. And the petitioner further relies, but without limiting the same thereto, on the case of *Commissioner* v. *Adams*, decided by the United States Circuit Court of Appeals for the First Circuit, on December 17, 1931, reported in 54 Fed. (2d) 228.

Wherefore, the petitioner prays that the Board may hear this proceeding and determine that the alleged deficiency is not in fact due from the petitioner, that the petitioner be relieved from the deficiency so asserted against him by the respondent, that the correct tax for the year 1929 be determined to be as has heretofore been paid by the petitioner, and that the petitioner have such further relief as he may be by law entitled.

SEWELL L. AVERY,
Petitioner,
By LELAND K. NEEVES,
Counsel for Petitioner,
134 S. La Salle Street
Chicago, Illinois

Of Counsel
SCOTT, MACLEISH & FALK
134 South LaSalle Street
Chicago, Illinois

7 State of Illinois } ss.
County of Cook }

SEWELL L. AVERY being first duly sworn upon oath says that he is the petitioner above named, that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated therein are true.

SEWELL L. AVERY.

Subscribed and Sworn to before me this 11th day of March, A. D. 1932.

ASTRID O. LYNUM,
(Seal) *Notary Public.*

My Commission Expires Sept. 18, 1934.

8 EXHIBIT 1.

XP-2-28

IT:AR:D-1 Copy
AHB-60D
Mailed
Jan. 29, 1932

Mr. Sewell L. Avery,
300 West Adams Street,
Chicago, Illinois

Sir:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $2,658.13, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By (Signed) J. C. WILMER
Deputy Commissioner

Enclosures:
Statement
Form 882
Form 870

JBW-1

9 **Statement**

IT:AR:D-1
AHS-60D

In re: Mr. Sewell L. Avery,
300 West Adams Street,
Chicago, Illinois.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$11,810.66	$9,152.53	$2,658.13

The report of the internal revenue agent in charge at Chicago, Illinois, covering an examination of your books of account and records for 1929 has been reviewed by this office together with your protest and a memorandum of a conference held in the revenue agent's office April 28, 1931, disclosing the above deficiency in tax outlined as follows:

Ordinary net income reported on return		$61,473.24
Capital net gain reported on return		10,585.00
Add:		
1. Additional interest income		23,969.04
2. Ordinary loss from sale of securities decreased		11,000.00
3. Additional dividends		12,768.96
4. Decrease in taxes paid		2.81
Total		$119,799.05
Deduct:		
5. Additional contributions	$ 7,098.87	
6. Decrease in capital gain	11,000.00	18,098.87
Total adjusted net income		$101,700.18
Computation of Tax		
Total net income adjusted		$101,700.18
Plus:		
Capital net loss included		415.00
Ordinary net income adjusted		$102,115.18
10 Less:		
Dividends	$303,672.08	
Personal exemption and credit for dependents	2,000.00	305,762.08
Net income subject to normal tax		None
Surtax on $102,115.18		$ 12,083.04

Less:		
Tax at 12 1/2% on $415.00		51.88
Total		$ 12,031.16
Less:		
Earned income credit	$220.00	
Tax paid at source	.50	220.50
Tax liability		$ 11,810.66
Tax originally assessed	$5,738.34	
Additional assessment	3,414.19	9,152.53
Deficiency in tax		$ 2,658.13

Explanation of Changes

1. Interest received from the United States Gypsum Company of $20,410.00 and from the Kreuger and Toll Company of $3,559.04 have been included as taxable income on your return.

2 and 6. Loss from sale of 200 shares of Chronicle of America Picture of $11,000.00 reported as an ordinary loss has been treated as a capital loss for the reason that this stock was held over two years.

3. Dividends declared in December 1929 of $48,984.00 less amount dividends of $32,656.00 declared in December 1928 has been included as taxable income on your return. An item of interest reported as dividends from the Kreuger and Toll Company of $3,559.04 has been transferred to item one above.

You are advised that consideration has been given your protest against the inclusion of dividends declared in December 1929 by the United States Gypsum Company and the exclusion of dividends declared by this company in December 1928. Since the question is pending before the United States Board of Tax Appeals for prior years your contention is denied.

11 4. Proper deduction for taxes paid on personal property at Grand Island has been determined to be $113.37 instead of $116.18 claimed on your return.

5. Contributions have been increased to 15% of your adjusted net income.

A copy of this communication has been transmitted to your representative, Mr. L. K. Neeves, 134 South LaSalle Street, Chicago, Illinois, who has a power of attorney on file in this office.

JBW-1

12 EXHIBIT 2.

Resolved: That an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929.

It Is Also Resolved: That for the purpose of the foregoing, the stock books be closed for the transfer of common stock from the close of business on December 14, 1929, to December 31, 1929, inclusive.

13 EXHIBIT 3.

Feb 2,

Resolved: That an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend, and that this amount be paid to be common stockholders of record at the close of business on that date, on or before December 31, 1928.

It Is Also Resolved: That for the purpose of the foregoing, the stock books be closed for the transfer of common stock from the close of business on December 15, 1928, to December 31, 1928.

14 * * (Caption 62783) * *

ANSWER.

Filed May 13, 1932.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations of paragraph 1.

2. Admits that notice of deficiency was mailed to petitioner on January 29, 1932.

3. Admits the allegations of paragraph 3.

4. Denies that the Commissioner committed the errors alleged in subparagraphs (a), (b), and (c) of paragraph 4.

5. Denies the allegations of paragraph 5.

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

11d
5/12/32

40-53 * * (STATEMENT OF EVIDENCE. Omitted per order of July 24, 1933. See index.) * *

15 * * (Caption 40238 and 62783) * *

Leland K. Neeves, Esq., for the petitioner.

Chester A. Gwynn, Esq., for the respondent.

MEMORANDUM OPINION.

Trammell: In the petitions filed in these proceedings, which were consolidated for hearing, the petitioner alleges error on the part of the respondent in determining deficiencies and overassessments as follows:

Docket No.	Year	Deficiency	Overassessment
40238	1924	$101,269.87	
	1925		$ 20,995.68
	1926		3,791.26
62783	1929	2,658.13	

Inasmuch as the respondent has not determined deficiencies in tax for 1925 and 1926 we do not have jurisdiction
16 with respect to such years. The proceeding in Docket No. 40238 will be dismissed in so far as it relates to a

determination of the petitioner's tax liability for those years. *Cornelius Cotton Mills*, 4 B. T. A. 255.

The only matter presented for determination with respect to the years 1924 and 1929 is the correctness of the respondent's action in including in the petitioner's taxable income for such years certain dividends on corporate stock owned by the petitioner which were declared in such years, which were payable on December 31 of such years and checks for which were not actually received by petitioner until January 2 of the years following. In addition to certain testimony the proceedings were submitted on a stipulation of facts, pertinent portions of which are as follows:

> The petitioner in the above causes is an individual and at all material times herein is and was a citizen of the United States and a resident of the City of Evanston, County of Cook and State of Illinois.
>
> Petitioner is and at all material times herein was, a stockholder of the United States Gypsum Company, an Illinois corporation with its principal office at No. 300 West Adams Street, Chicago, Illinois, formerly No. 205 West Monroe Street, Chicago, Illinois, owning a minority number of the preferred and common shares of the capital stock of said corporation. Petitioner is and at all of said times was President of said corporation.
>
> Petitioner has always kept his accounts and has reported his income upon a cash receipts and disbursements basis and upon a calendar year basis.
>
> The Commissioner has determined a deficiency for the year 1924 of $101,269.27, * * * and a deficiency for the year 1929 of $2,658.13.
>
> In determining the said deficiency of $101,269.27 for the year 1924, the Commissioner increased the taxable income reported by the petitioner for said year by the amount of $266,490.10, representing certain dividends received by the petitioner as a stockholder of said United States Gypsum Company.
>
> 17 The said dividends of $266,490.10 were paid pursuant to a resolution of said corporation duly adopted on November 12, 1924, reading as follows:
>
> "Resolved that an amount equal to one and three-quarters (1-3/4%) per cent. on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the

close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an amount equal to two (2%) per cent. on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924.

The said dividends of $266,490.10 were reported by the petitioner in his income tax return for the calendar year 1925.

* * * * * *

On November 14, 1928, the said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1928;

"It Is Also Resolved that for the purpose of the foregoing the stock books be closed for the transfer of common stock from the close of business on December 15, 1928 to December 31, 1928."

Petitioner received dividends amounting to $32,656.00 from said corporation under the last mentioned resolution.

18 On November 13, 1929, said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929;

"It Is Also Resolved that for the purpose of the foregoing, the stock books be closed for the transfer of com-

mon stock from the close of business on December 14, 1929 to December 31, 1929, inclusive."

Petitioner received dividends amounting to $48,984.00 from said corporation pursuant to said last mentioned resolution.

In determining the deficiency for the said year 1929, amounting to $2,658.13, the Commissioner increased the petitioner's taxable income by the amount of said dividends of $48,984.00 and decreased the petitioner's taxable income by the amount of said dividends of $32,656. Petitioner included the said dividends of $48,984.00 in his return for the year 1930 and had included the said dividends of $32,656.00 in his return for the year 1929.

The said dividends of $266,490.10 received by the petitioner pursuant to the resolution adopted on November 12, 1924, were paid to the petitioner by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1925, on, to-wit, January 2, 1925. * * * The said dividends of $32,656.00 received by the petitioner pursuant to said resolution of November 14, 1928 were paid by the check or checks of said corporation, which checks were actually received by the petitioner in January, 1929, on, to-wit, January 2, 1929. The said dividends of $48,984.00 received by the petitioner pursuant to the resolution of November 13, 1929 were paid by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1930, on, to-wit, January 2, 1930.

The practice followed by the United States Gypsum Company in the distribution of its dividend checks for the years 1924 through 1929 was as follows: The treasurer's department which has supervision of the matter received from the secretary a complete list of the stockholders, showing the number of shares and the addresses of the stockholders and the amounts to which they were entitled. Upon receipt of the list, the treasurer's department turned over to the addressograph department blank checks upon which were printed the names of the stockholders respectively and their addresses. The checks were then returned to the treasurer's department. The checks were then signed with the amount of the check still in blank and the check numbers were imprinted upon the stockholders' list. The amount of each check was then filled in and the checks were totalled and balanced with the dividend list. They were then separated,

the checks up to that time being in sheets of five, were dated and inserted in their envelopes.

The checks were turned over to the mailing department in the afternoon anywhere from one to three o'clock. The mailing department sealed the envelopes, stamped the permit number on the envelopes for mailing, and took the envelopes to the post office. The checks never left the mailing department before six o'clock. In many instances it was necessary for the mailing department to work until six or seven o'clock and then take the checks to the post office. Usually the envelopes containing the checks were taken to the post office by a trucking company that took the company's mail to the post office and upon some occasions when the mailing department had worked overtime, the checks were taken to the post office in a taxi cab.

20 The stockholders' or dividend list was usually received from the secretarial department by the treasurer's department anywhere from the 20th to the 22nd of the month. The work of the treasurer's department started when the list was received from the secretarial department. The dividend checks never left the treasurer's office or were sent to the mailing department until the afternoon of the last day of the month, and the checks were mailed on the last day of the month so as to be in the stockholders' hands on the first business day of the following month.

Dividends were payable quarterly and in every instance they were made payable on or before the last day of the month, the 30th or 31st, depending upon the month.

In the case of certain of the stockholders who were employees of the company, at the Chicago general office, including the petitioner, approximately fifty in number, the dividend checks were not mailed but were held in the treasurer's office until the first business day of the following month and were then distributed to the employees through the office mail. The petitioner's dividend checks were always delivered to his secretary on the first business day of the following month. The practice was without exception that no stockholder, whether employee or officer, receive his check before the first business day of the month following the month in which the dividends were made payable.

21 The number of shares of stock of the United States Gypsum Company outstanding and the number of shares owned by the petitioner were as follows on the dates indicated:

Date	Common Stock Shares Outstanding	Common Stock Shares Owned by Petitioner	Preferred Stock Shares Outstanding	Preferred Stock Shares Owned by Petitioner
Dec. 5, 1924	325,397	48,604	84,649	2,302
Dec. 5, 1925	440,723	65,618	82,772	2,302
Dec. 15, 1928	760,436	81,640	77,281	2,306
Dec. 14, 1929	1,149,315	122,406	75,417	2,306

The petitioner contends that under the circumstances here presented the respondent erred (1) in including in taxable income for 1924 the dividends of $266,490.10 declared by the corporation on November 12, 1924 payable on or before December 31, 1924 to stockholders of record at the close of business on December 5, 1924 and the check or checks for which were not actually received by the petitioner until on January 2, 1925 and (2) in including in taxable income for 1929 the dividends of $48,984 declared by the corporation on November 13, 1929 payable on or before December 31, 1929 to stockholders of record at the close of business on December 14, 1929 and the check or checks for which were not received by the petitioner until on January 2, 1930. The respondent contends that his action was correct and should be sustained.

The petitioner contends that under the Revenue Acts of 1924, 1926 and 1928 the time of the actual receipt of dividends determines the year in which they are to be subject to
22 tax and that since the checks for the dividends in controversy were actually received by him in the years following those in which the respondent seeks to tax them the respondent's action should be reversed.

The pertinent provisions of the Revenue Act of 1924 are as follows:

> SEC. 213. For the purposes of this title * * *
>
> (a) The term "gross income" includes * * * income derived from * * * dividends * * * The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.
>
> SEC. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer;

In so far as here material the pertinent portions of the Revenue Acts of 1926 (Secs. 212 and 213) and 1928 (Sections 22, 41 and 42) are substantially the same as the foregoing provisions of the Revenue Act of 1924.

Respecting the time when dividends are to be included in gross income neither the Revenue Act of 1924 nor the subsequent Acts contain the same or a similar provision to that contained in section 201 (e) of the Revenue Act of 1921 to the effect that "a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands." The petitioner pointing to the omission in the later acts of the provision contained in section 201 (e) of the Act of 1921 and relying on the statements of the court in *Commissioner* v. *Cecil Q. Adams*, 54 Fed. (2d) 228, Circuit 23 Court of Appeals, First Circuit, in affirming 20 B. T. A. 243 urges that we reconsider the decisions which we have rendered since our decision in the *Adams* case and which involved the time for including in income under the 1924 and later Acts dividends received under circumstances similar to those here presented.

In *Cecil Q. Adams, supra*, there was involved the question of the inclusion in the taxpayer's gross income for the calendar year 1924 the amount of a dividend which was declared on December 26, 1924 by a resolution which stated "Checks for same to be mailed December 31, 1924" where the taxpayer, who kept his books and reported his income for each calendar year on the basis of cash received and disbursed, received a check for his dividend in due course on January 2, 1925. We there considered the legislative history relating to the omission from the Act of 1924 of the above quoted provision contained in section 203 (e) of the Revenue Act of 1921 and said:

> Clearly, Congress intended that even under the 1924 Act there might be a constructive receipt of dividends which would make such dividends taxable to the stockholder prior to the date upon which he actually received them. In this Act, Congress apparently abandoned a specific provision that all items of gross income would be taxable in the year in which unqualifiedly made subject to the demands of the taxpayer, because it considered that such would be the rule followed even in the absence of a statutory provision. In other words, Con-

gress beieved that there were some cases in which the courts would and should hold that income was constructively received under well established rules of law and no enlargement of these rules was necessary. Each case in which the Commissioner attempts to apply the rule of constructive receipt will depend upon its own facts as to whether or not there is justification for the application of such a rule. But, in general, income should not be construed to have been received prior to the date of actual receipt except where a taxpayer turns his back upon income or does not choose to receive income which he could have if he chose. Cf. *John A. Brander, supra; Robert W. Bingham,* 8 B. T. A. 603.

24 Inasmuch as the resolution declaring the dividend expressly provided that checks should be mailed on December 31, 1924, as the language was purposely inserted in such resolution and as there was no other time of payment fixed and no other method of payment authorized we concluded that the dividend was not unqualifiedly subject to the demand of the taxpayer in 1924 and therefore was not to be included in the petitioner's taxable income for 1924.

In affirming our decision the Circuit Court of Appeals said:

> The Board of Tax Appeals in its opinion distinguished the present case from that of *Commissioner* v. *Bingham,* 35 Fed. (2d) 503, 281 U. S. 729, 50 S. Ct. 246, on the ground that the latter arose under the Revenue Act of 1921 (42 Stat. c. 136), which contained a provision in Sec. 201 (e) that dividends "shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands"; and on the further ground that the resolution, above referred to, fixed the time of payment as of December 31, 1924, and the method of payment to be by check, mailed on that day; and fixed no other time of payment and authorized no other method.
>
> The case of *Commissioner* v. *Bingham, supra,* is clearly distinguishable from the present one, for the reason that the tax there in question was governed by the Revenue Act of 1921, in which Sec. 201 (e) expressly provides that dividends "shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands," which provision the Act of 1924 does not contain.

The Act of 1924 not only does not contain the above provision, but in Section 213 (a) expressly provides that dividends "shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of Section 212," with which exception we are not concerned.

The applicable provisions of Section 213 (a) are not ambiguous; the language used clearly expresses the intention of Congress. Its intention, where the language of the Act is unambiguous and its meaning plain, is to be gathered from the Act itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this Act speaks for itself; it does not call for construction. And on this ground alone, we think that the Board of Tax Appeals did not err in reaching the conclusion that it did.

We are also of the opinion that, on the facts found, the dividends were not "unqualifiedly made subject to the demand of the stockholder," in the year 1924, if Art. 52 of the Departmental Regulations can be said to be valid and not in conflict with the express language of Sec. 213 (a).

The petitioner contends that under the language used by the court there is no authority in the Revenue Acts of 1924, 1926 and 1928 for including in taxable income dividends received under the circumstances here involved.

Subsequent to our decisions in the *Adams* case and prior to the affirmance thereof by the Circuit Court of Appeals we decided *Mary Miller Brarton*, 22 B. T. A. 128 which arose under the Revenue Act of 1926. The *Brarton* case involved the inclusion in income for 1927 by a taxpayer on the cash receipts and disbursements and calendar year basis of dividends declared in that year, the checks in payment of which were dated and mailed December 31, 1927 but not actually received by the taxpayer until January 2, 1928. After again reviewing the legislative history relating to the omission from the later Revenue Acts of the provisions contained in section 203 (c) of the Revenue Act of 1921 we said:

From these reports and the various stages of the bill, it is clear that the legislative intent was that gross income should continue to include the items covered by section 201 (c) of the 1921 Act, and that the general language of the statute was sufficient to express this intent.

> We think the language of the 1924 and 1926 Acts is entirely susceptible of this construction, or, to put it contrariwise, we think that the language used does not clearly exclude such items from gross income, and hence that the actual intention may properly be effectuated by the application of the general language to dividends, when subject to demand. These dividends were payable in 1927, and, as held generally in the *Bingham* case, *supra*, were, therefore, in the absence of evidence to the contrary, receivable by the stockholder on mere demand and hence constructively received.

In distinguishing our decision in that case from that in the *Adams* case we said:

> *Cecil Q. Adams*, 20 B. T. A. 243, contained an important difference—the dividend was only payable by a check to be mailed December 31, and hence the stockholder had no right to demand payment otherwise before receipt by mail.

Subsequent to the decision of the Circuit Court of Appeals in the *Adams* case we decided the case of *Effie B. Shearman*, 26 B. T. A. 716 which arose under the Revenue Act of 1928. There dividends were declared in 1928 payable on December 31, 1928 to stockholders of record "at the close of business on that day." Checks dated December 31, 1928 were mailed on that date to and were received on January 2, 1929 by the taxpayer who reported her income on the cash receipts and disbursements basis. Following our decision in the *Braxton* case we held the dividends to be taxable in 1928.

Franklin J. Matchette, 26 B. T. A. 909 involved the question of the taxability in 1924 of dividends declared December 20, 1924, payable December 31, 1924 to stockholders of record on December 15, 1924 the check in payment of which was mailed on December 31, 1924, and received between January 2, and January 7, 1925 by the taxpayer who filed his returns on
27 a cash receipts and disbursements basis. Following our decisions in the *Braxton* and *Shearman* cases we held the dividends to be taxable in 1924.

While we recognize that our holdings in the *Braxton*, *Shearman* and *Matchette* cases are not in harmony with some of the language used by the court in the *Adams* case we are, however, of the opinion that our view expressed in the *Braxton* case and followed in the later cases, "that the legislative intent was that gross income should continue to include the items covered by section 201 (e) of the 1921 Act" is sound

and should continue to be followed. With due deference to the view expressed by the Circuit Court of Appeals for the First Circuit in the *Adams* case we must say that our decisions are reviewable by all of the Circuit Courts of Appeal and until others speak on this question we do not feel that we should abandon the view which we have heretofore adopted and followed.

The facts in the instant proceedings are almost identical with those in the *Braxton, Shearman* and *Matchette* cases. In those cases checks for the dividends were mailed to the taxpayers. In these proceedings they were not mailed on December 31 of the respective years to the taxpayer, who according to the pleadings and stipulated facts had the same business address as the corporation, but were delivered to him the following business day through the "office mail." This difference is not material, for as was said in the *Matchette* case the voluntary mailing of a dividend check by a corporation has no spe-
28 cial legal significance. The dividends in controversy were declared in 1924 and 1929 respectively and were payable on December 31 of such years. On the dates the dividends were payable the petitioner had a legal right to demand and receive payment thereof in cash. The fact that he did not choose to exercise such right but waited for the delivery of checks to him in the following years did not in any wise destroy such right. *Commissioner v. Bingham*, 35 Fed. (2d) 503. On the facts before us we are of the opinion that the dividends were receivable by the petitioner on the dates payable. Being thus receivable on such dates they were constructively received by the petitioner during the taxable years in controversy and therefore were subject to tax in such years. We perceive no error in the respondent's action and accordingly it is sustained.

JUDGMENT WILL BE ENTERED FOR THE RESPONDENT.

Enter:

Entered Feb 2 1933

29 * * (Caption 62783) * * Entered Fe 1933.

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered February 2, 1933, it is

Ordered and Decided: That there is a deficiency of $2,658.13 for the year 1929,

Enter:

(S[illegible]ed) CHARLES M. TRAMMELL
Member.

(Seal)

Entered Feb 2 1933

30 * * (Caption 62783) * * Filed Apr. 1933.

PETITION FOR REVIEW OF BOARD DECISION.

Filed April 25, 1933.

Petition of Sewell L. Avery for Review by the United States Court of Appeals for the Seventh Circuit of a Decision by the United States Board of Tax Appeals.

Sewell L. Avery, the petitioner in this cause, by Leland K. Neeves, counsel, hereby files his petition for a review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision by the United States Board of Tax Appeals rendered on February 2, 1933 in the above cause, determining a deficiency in the petitioner's federal income taxes for the calendar year 1929 in the amount of $2,658.13, and respectfully shows:

31 I.

The petitioner is an individual and resides in the City of Evanston, County of Cook and State of Illinois, with his business address at No. 300 West Adams Street, Chicago, Illinois.

The petitioner being aggrieved by the said decision and final determination of the Board of Tax Appeals in the above entitled cause desires a review thereof in accordance with the provisions of the Revenue Act of 1926 as amended and/or

other applicable statutes by the United States Circuit Court of Appeals for the Seventh Circuit whereof the petitioner is an inhabitant.

II.

Nature of the Controversy.

The petitioner reported his income to the Commissioner of Internal Revenue for federal income tax for the year 1929 upon the calendar year basis. At all times material to this case, petitioner has reported his income upon such calendar year basis and upon the cash receipts and disbursements basis.

At all material times herein, the petitioner was President of United States Gypsum Company, an Illinois corporation, and was a stockholder therein.

32 On November 14, 1928, United States Gypsum Company declared a dividend upon its common stock, payable on or before December 31, 1928 to stockholders of record at the close of business on December 15, 1928. The resolution declaring said dividend was as follows:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1928;

"It Is Also Resolved that for the purpose of the foregoing the stock books be closed for the transfer of common stock from the close of business on December 15, 1928 to December 31, 1928."

Pursuant to said resolution a dividend amounting to $32,656.00 was paid to the petitioner, the check therefor being actually received by him on January 2, 1929. This dividend was included in petitioner's income tax return for the calendar year 1929, the year in which the dividend check was actually received by him and was not included in petitioner's income tax return for the calendar year 1928.

On November 13, 1929, United States Gypsum Company declared a dividend upon its common stock, payable on or before December 31, 1929 to stockholders of record at the close of business on December 14, 1929. The resolution declaring said dividend was as follows:

33 "Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929;

"It Is Also Resolved that for the purpose of the foregoing, the stock books be closed for the transfer of common stock from the close of business on December 14, 1929 to December 31, 1929, inclusive."

Pursuant to said last named resolution, a dividend of $48,984.00 was paid to the petitioner, the check therefor being actually received by him on January 2, 1930. This dividend was included in petitioner's income tax return for the calendar year 1930, the year in which the dividend check was actually received by him and was not included in petitioner's income tax return for the calendar year 1929.

Similarly in prior years United States Gypsum Company had declared dividends upon its preferred and common stock, said dividends being payable on or before December 31st of the respective years in which said dividends were declared. Petitioner received dividends pursuant to such resolutions and returned the same in his income tax return for the respective years in which the dividend checks were actually received by him. The same issue involved in the above entitled cause is also involved in Docket No. 40238 involving
34 the years 1924, 1925 and 1926, the determination of the Board of Tax Appeals in said Docket No. 40238 being the subject-matter of a separate petition for review.

Treating in each case, including the calendar year 1929, the dividends so received by the petitioner as income for the year in which such dividends were respectively declared and by said respective resolutions made payable, and not as income for the respective years in which the dividend checks were actually received by the petitioner, respondent increased petitioner's 1929 income by the amount of said dividends of $48,984 and decreased said income by the amount of the said dividend of $32,656. Corresponding charges were made in prior and subsequent years, respondent as to each year insisting on including the respective dividends as income for the year immediately prior to the year in which said dividends were respectively reported by the petitioner.

For convenience the following table shows the years for which the said respective dividends were reported by the peti-

tioner and the years for which respondent insisted that said respective dividends be reported:

Year	Returns as Made	Returns as Adjusted
1924	.....	$266,490.10
1925	$266,490.10	161,511.70
1926	161,511.70	140,117.30
1927	140,117.30	.....
1928	.....	32,656.00
1929	32,656.00	48,984.00
1930	48,984.00	.....

35 The foregoing adjustment as to the year 1929 resulted in the asserted deficiency of $2,658.13 and as to the year 1924, an asserted deficiency of $101,269.27, and overassessments of $20,995.68 and $3,791.26 for 1925 and 1926 respectively. The said deficiency for 1924 has also been sustained by the Board of Tax Appeals in said Docket No. 40238.

During all of the times material to this case the established practice and custom of United States Gypsum Company in the preparation and sending out of its dividend checks was such as to preclude the receipt by any stockholder of his dividend check or checks until on or after the first business day of the calendar month next succeeding the date on or before which, according to the resolutions, the respective dividends were payable. All dividends were payable quarterly and were made payable on or before the 30th or 31st day of the last calendar month, depending upon the month, of the quarterly period. In the case of the dividends here involved and in the case of all dividends which were payable on or before December 31st of any year, the preparation and sending out of the dividend checks was such as to preclude any stockholder from receiving his dividend check or checks until January 2nd of the year next following. That the stockholders, including the petitioner, did not receive the dividend checks until the first business day of such succeeding calendar month was therefore due to the established practice and custom and
36 action of the company and not in any way to any voluntary act on the part of the stockholders.

On December 15, 1928, the total outstanding common stock of the company was 760,436 shares (par value $20) and the total outstanding preferred stock was 77,281 shares (par value $100). At the close of business on the same day the

petitioner owned 81,640 shares of the common stock and 2,306 shares of preferred stock. On December 14, 1929, the total outstanding common stock of the company was 1,149,315 and the total outstanding preferred stock was 75,417 shares. At the close of business on said last mentioned date, the petitioner owned 122,460 shares of common stock and 2,306 shares of preferred stock.

As heretofore shown, the Commissioner included the said dividends of $48,984.00 in, and excluded the said dividends of $32,656.00 from, petitioner's income for 1929, treating the former dividends as 1929 income and the latter dividends as 1928 income.

The petitioner thereupon filed his petition with the United States Board of Tax Appeals, contending that the said dividends of $48,984.00 constituted income for the year 1930 in which the dividends were actually received by him and did not constitute income for the calendar year 1929, as
37 claimed by the Commissioner, and that the proper amount of dividends returnable as 1929 income was the said amount of $32,656.00. But the Board of Tax Appeals by its opinion and order of February 2, 1933, sustained the claims of the Commissioner and held the said dividends of $48,984 to be taxable income for 1929. This meant a net increase in the dividends for 1929 of $16,328.00. The Board of Tax Appeals thereupon determined a deficiency against petitioner as claimed by the Commissioner, to-wit, $2,658.13.

III.

Assignment of Error.

The petitioner assigns error as to the following acts and omissions of the Board of Tax Appeals:

(1) That the Board of Tax Appeals erred in holding that the said dividends amounting to $48,984, the dividend checks for which were not actually received by the petitioner until January 2, 1930, constituted taxable income for the calendar year 1929.

(2) That the Board of Tax Appeals erred in not holding that the said dividends of $48,984 constituted taxable net income for the calendar year 1930.

(3) That the Board of Tax Appeals erred in holding
38 that the said dividends of $48,984 were constructively received by the petitioner in 1929.

(4) That the Board of Tax Appeals erred in not holding that the said dividends of $32,656 constituted taxable income for the calendar year 1929 and not for the calendar year 1928.

(5) That the Board of Tax Appeals erred in determining a deficiency against the petitioner in said sum of $2,658.13, or in any sum whatsoever.

(6) That the Board of Tax Appeals erred in not entering judgment for the petitioner.

(7) That the Board of Tax Appeals erred in entering judgment for the respondent.

LELAND K. NEEVES,
Attorney for Sewell L. Avery,
134 South LaSalle Street,
Chicago, Illinois.

39 United States of America,
State of Illinois,
County of Cook. } ss.

Leland K. Neeves being first duly sworn, deposes and says that he is counsel of record for the petitioner in the above named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief; and that said petition is filed in good faith.

LELAND K. NEEVES.

Subscribed and sworn to before me this 22nd day of April, 1933.

BLANCHE E. NOVAK,
(Notarial Seal) *Notary Public.*

My Commission expires May 15, 1933.

54 * * * (Caption) * * *

PRAECIPE FOR RECORD.

Filed June 2, 1933.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

55 (3) Memorandum opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) The statement of evidence.

(7) This Praecipe.

(8) All orders for the enlargement of the time for the transmission and delivery of the above mentioned documents. Not included in Transcript.

LELAND K. NEEVES,
Attorney for Petitioner.

May 27th, 1933.

Personal service of a copy of the foregoing praecipe for record is hereby acknowledge this 2nd day of June, 1933.

(Sgd) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

56 * * (Caption) * *

ORDER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding by the United Ctates Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to July 31, 1933.

(Signed) LOGAN MORRIS,
Member.

Dated Washington, D. C.,
June 19, 1933.

57 * * (Caption) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 55, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 11th day of July, 1933.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery,
Petitioner,
vs.
Commissioner of Internal Revenue. } No. 5029.

Sewell L. Avery,
Petitioner.
vs.
Commissioner of Internal Revenue. } No. 5030.

ORDER.

Upon motion of Sewell Lee (L.) Avery, petitioner in the above two causes, by Leland K. Neeves, his attorney,

It Is Hereby Ordered that said causes be consolidated for hearing and for briefs and that a consolidated transcript of record be prepared and printed and the statement of evidence, being the same in each case, shall be printed in No. 5029 and incorporated by reference in No. 5030.

Entered this 24th day of July, 1933.

SAMUEL ALSCHULER,
Judge, United States Circuit Court of Appeals.

Endorsed: In the United States Circuit Court for the Seventh Circuit. Sewell Lee Avery, Petitioner, vs. Commissioner of Internal Revenue, No. 5029; Sewell L. Avery, Petitioner, vs. Commissioner of Internal Revenue, No. 5030. Order consolidating causes for hearing and briefs and for a consolidated transcript. Filed July 24, 1933. Frederick G. Campbell, Clerk. Scott, MacLeish & Falk, Attorneys at Law, 134 South La Salle Street, Randolph 9000, Chicago.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 71, inclusive, contain a true copy of the printed record printed under my supervision and filed on the fourth day of August, 1933, on which the following entitled causes were heard and determined:

Sewell Lee Avery

No. 5029 *vs.*

Commissioner of Internal Revenue

Sewell L. Avery

No. 5030 *vs.*

Commissioner of Internal Revenue

October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of December, A. D. 1933.

FREDERICK G. CAMPBELL,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the fourth day of October, 1932, of the October Term, in the year of our Lord Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-seventh.

5029 Sewell Lee Avery *vs.* Commissioner of Internal Revenue } Petition for Review of Order of the United States Board of Tax Appeals.

And afterwards, to-wit: On the eighteenth day of July, 1933, there was filed in the Office of the Clerk of this Court an Appearance of Counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5029. October Term, 1932.

Sewell Lee Avery,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

The Clerk will enter my appearance as counsel for Petitioner.

LELAND K. NEEVES,
134 So. La Salle St.,
Chicago, Illinois.

Endorsed: Filed July 18, 1933. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-fourth day of July, 1933, there was filed in the Office of the Clerk of this Court an Appearance of counsel for Respondent, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5029. October Term, 1932.

Sewell Lee Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

The clerk will enter my appearance as counsel for Respondent.

PAT MALLOY,
SEWALL KEY,
Washington, D. C.

Endorsed: Filed July 24, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fourth day of July, 1933, there was filed in the Office of the Clerk of this Court an Affidavit of Service, Notice, Motion for Consolidation and for a Consolidated Transcript, and Affidavit in Support of Motion, which said Affidavit, Notice, Motion and Affidavit are in the words and figures following, to-wit:

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5029.

Sewell L. Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5030.

AFFIDAVIT.

State of Illinois, County of Cook. } ss.

LELAND K. NEEVES being first duly sworn on oath deposes and says that on Wednesday, the 19th day of July, 1933, he caused to be mailed to the Attorney General at Washington, D. C., a certain Notice, together with copies of the motion, affidavit in support thereof, and proposed order referred to therein (copies of which are attached hereto), the same being deposited in the United States mail, postage prepaid, addressed to said Attorney General, Washington, D. C.

Further affiant saith not.

LELAND K. NEEVES.

Subscribed and Sworn to before me this 19th day of July, 1933.

MILDRED C. SANDLEY,
Notary Public.

(Seal)

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5029.

Sewell L. Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5030.

NOTICE.

To: The Attorney General,
Washington, D. C.,
Attorney for Respondent.

You Are Hereby Notified that on Monday next, July 24, 1933, at 10 o'clock in the forenoon, Chicago Daylight Saving Time, or as soon thereafter as counsel can be heard, before the Honorable Samuel Alschuler, presiding Judge of the United States Circuit Court of Appeals for the Seventh Circuit, in chambers, or in his absence before some one of the other Judges of said United States Circuit Court of Appeals for the Seventh Circuit, in the Federal Building, Chicago, Illinois, we shall move for a consolidation of the above causes for hearing and for briefs and for a consolidated transcript in accordance with the Motion, copy of which is handed you herewith. Said Motion is supported by the Affidavit of the undersigned, copy of which, together with a copy of the proposed Order, is handed you herewith.

LELAND K. NEEVES,
Attorney for Petitioner.

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5029.

Sewell L. Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5030.

MOTION FOR CONSOLIDATION AND FOR A CONSOLIDATED TRANSCRIPT.

Now comes Sewell Lee (L.) Avery, petitioner in the above two causes, by Leland K. Neeves, his attorney, and moves that said causes be consolidated for hearing and for briefs and that a consolidated transcript of the record be prepared and printed and that the statement of evidence, being the same in each case, shall be printed in No. 5029 and incorporated by reference in No. 5030.

LELAND K. NEEVES,
Attorney for the above named Petitioner.

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5029.

Sewell L. Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5030.

AFFIDAVIT.

State of Illinois, } ss.
County of Cook. }

LELAND K. NEEVES, being first duly sworn upon oath deposes and says that he is the attorney for the petitioner in the above two causes; that he is familiar with the proceedings had in said causes before the United States Board of Tax Appeals; that said causes before said United States Board of Tax Appeals, being No. 40238 and No. 62783, respectively, involve the same general question as to whether certain dividends declared and by the resolutions declaring the same made payable in one year but not actually received by the petitioner until the following year, should be returned by petitioner as part of his taxable net income for the year in which said dividends were declared or for the year in which said dividends were received; that said two causes were consolidated for hearing before the said United States Board of Tax Appeals, and that although a separate statement of evidence was filed in each of said two causes for purposes of review, the evidence is the same in each case.

Affiant further states that it will be for the convenience of the court and the parties concerned to have said two causes consolidated for hearing and for the filing of briefs and to

have a consolidated transcript prepared and printed with the statement of evidence printed only in No. 5029 and incorporated by reference in No. 5030.

Further affiant saith not.

LELAND K. NEEVES.

Subscribed and Sworn to before me this 19th day of July, A. D. 1933.

MILDRED C. SANDLEY,
Notary Public.

(Seal)

Endorsed: Filed July 24, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fourth day of July, 1933, the following further proceedings were had and entered of record, to-wit:

Monday, July 24, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.

5029	Sewell Lee Avery vs. Commissioner of Internal Revenue	Petition for Reviews of Orders of the United States Board of Tax Appeals.
5030	Sewell L. Avery vs. Commissioner of Internal Revenue	

On motion of Sewell Lee (L.) Avery, petitioner in the above two causes, by Leland K. Neeves, his attorney,

It is hereby ordered that said causes be consolidated for hearing and for briefs and that a consolidated transcript of record be prepared and printed and the statement of evidence, being the same in each case, shall be printed in No. 5029, and incorporated by reference in No. 5030.

And afterwards, to-wit: On the twenty-fifth day of July, 1933, there was filed in the Office of the Clerk of this Court a Motion for Substitution of party respondent, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the 7th Circuit.

No. 5029.

Sewell Lee Avery,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

MOTION FOR SUBSTITUTION.

Comes now the above named petitioner and moves the court that Guy T. Helvering, Commissioner of Internal Revenue, be substituted for David Burnet as respondent herein, and in support of said motion respectfully shows:

1. That the resignation of said David Burnet, who was Commissioner of Internal Revenue when the petition for review in this proceeding was filed, was duly accepted and he ceased to be such officer on May 15, 1933.

2. That Guy T. Helvering was duly appointed and confirmed as Commissioner of Internal Revenue to succeed the said David Burnet; that he qualified as such officer and entered upon the duties of said office on June 6, 1933, since which date the said Guy T. Helvering has been and now is Commissioner of Internal Revenue.

3. That there is a substantial need for continuing and maintaining this proceeding and obtaining an adjudication of the questions involved, for otherwise the order of the United States Board of Tax Appeals herein sought to be reviewed will become final and the right to have the legality thereof determined will be extinguished.

This motion is made pursuant to the provisions of Section

11 of the Act of February 13, 1925, c. 229, 43 Stat. 941 (U. S. C., Title 28, Sec. 780).

Dated June 7, 1933.

LELAND K. NEEVES,
Attorney for Petitioner.

The undersigned, attorney for Guy T. Helvering, Commissioner of Internal Revenue, hereby expressly consents to the substitution sought by the above motion.

SEWALL KEY,
Special Assistant to the Attorney General, Attorney for Guy T. Helvering, Commissioner of Internal Revenue.

Endorsed: Filed July 25, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fifth day of July, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, July 25, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

5029	Sewell Lee Avery *vs.* Commissioner of Internal Revenue	Petition for Review of Order of the United States Board of Tax Appeals.

Upon motion of the petitioner, expressly consented to by Guy T. Helvering, Commissioner of Internal Revenue, it is hereby ordered that said Guy T. Helvering, as such officer, be, and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue, and that this proceeding be so continued and maintained.

And afterwards, to-wit: On the eleventh day of August, 1933, there was filed in the Office of the Clerk of this Court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5029. October Term, 1932.

Sewell Lee Avery,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

The Clerk will enter our appearance as counsel for respondent.

E. BARRETT PRETTYMAN,
General Counsel,

CHESTER A. GWINN,
Special Attorney, Bureau of Int. Revenue,
Washington, D. C.

Endorsed: Filed August 11, 1933. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-first day of September, 1933, there was filed in the Office of the Clerk of this Court, an Appearance of counsel for Respondent, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5029. October Term, 1932.

Sewell Lee Avery,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

The Clerk will enter our appearance as counsel for respondent.

PAT MALLOY,
Asst. Attorney General,
SEWALL KEY,
MORTON K. ROTHSCHILD,
Special Assts. to the Attorney General,
Washington, D. C.

Endorsed: Filed September 21, 1933. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hundred and Fifty-eighth.

And on the same day, to-wit: On the third day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 3, 1933.

Court opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5029	Sewell Lee Avery vs. Commissioner of Internal Revenue	Petition for Review of Order of the United States Board of Tax Appeals.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on October 19, 1933.

And afterwards, to-wit: On the nineteenth day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, October 19, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5029	Sewell Lee Avery vs. Commissioner of Internal Revenue	Petition for Review of Order of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Leland K. Neeves, Counsel for Petitioner, and by Mr. John MacC. Hudson, Counsel for Respondent, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-sixth day of October, 1933, there was filed in the Office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 5029 and 5030. October Term, 1933, October Session, 1933.

SEWELL LEE AVERY, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*
} Petitions for Review of Decisions of the United States Board of Tax Appeals.

October 26, 1933.

Before ALSCHULER, EVANS, and SPARKS, *Circuit Judges.*

EVANS, *Circuit Judge.* The two appeals here considered involve petitioner's 1924 and 1929 income taxes. The identical question is raised in each appeal. In what year is a dividend received for income tax purposes, the year the dividend is declared and payable or the year the stockholder receives the check therefor, if there be a difference in such years?

Petitioner was a large stockholder and president of the United States Gypsum Company, which, on November 12, 1924, declared a dividend on stock outstanding at the close of business on December 5, 1924, payable on or before December 31, 1924. A check for petitioner's dividend, dated December 31, 1924, amounting to $266,490.10, was by him received on January 2, 1925. A similar situation arose in 1929. The dividend was declared and made payable on or before December 31, 1929. The check which represented petitioner's

dividend was by him received on January 2 of the following year.

Petitioner raises no question as to liability for a tax upon such income. He complains of the ruling of the Board of Tax Appeals because that body approved the action of the Commissioner and held that these dividends constituted part of his income for the years 1924 and 1929. He insists that it was taxable to him as income in the years he received the dividend checks, which were 1925 and 1930.

Treasury Regulations 65, relating to the Revenue Act of 1924, provides:

> "ART. 52. *Examples of constructive receipt.*— * * * Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder. * * *
>
> "ART. 1541. *Dividends.*— * * * A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands."

Articles 333 and 621 of Treasury Regulations 74, relating to the Revenue Act of 1928, contain provisions substantially like those above quoted.

Petitioner contends that the regulations are not valid because in conflict with the statute, and *Commissioner* v. *Adams*, 54 F. (2d) 228, is cited in support of his contention. Commissioner, on the other hand, cites *Shearman* v. *Commissioner*, 66 F. (2d) 256; *Commissioner* v. *Bingham*, 35 F. (2d) 503; *Hadley* v. *Commissioner*, 36 F. (2d) 543; as well as rulings of the Board of Tax Appeals, Mary Miller Braxton, 22 B. T. A. 128; Franklin J. Matchette, 26 B. T. A. 909.

Both sides have advanced rather persuasive arguments in support of their respective contentions. They have been duly considered by the courts which have passed upon the same question, and there is little or nothing to be gained by a restatement of them. The principles governing judicial interpretation of statutes, the effect of departmental regulations followed by legislation, the effect of the elimination of a section in the Revenue Act following the promulgation of a regulation, as well as the weight to be given to the decisions of other courts—have all been duly and carefully considered with a result which will be announced without elaborating our reasons.

We conclude that the weight of the argument is in favor of

the conclusion that a stockholder of a corporation which has declared a dividend payable before a certain date, is on said date entitled to the sum thus declared as a dividend. His right thereto is traceable to the corporate action declaring the dividend, not to the check. The latter merely evidences the liability. It does not create the liability. The date the liability attaches, rather than the date of the check which evidences the liability, governs.

The orders of the Board of Tax Appeals are

AFFIRMED.

Endorsed: Filed October 26, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-sixth day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, October 26, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5029 Sewell Lee Avery *vs.* Commissioner of Internal Revenue } Petition for Review of Order of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the decision of the United States Board of Tax Appeals, entered in this cause on February 2, 1933, be, and the same is hereby affirmed.

And afterwards, to-wit: On the fifteenth day of November, 1933, there was filed in the office of the Clerk of this Court a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the twenty-first day of November, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, November 21, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5029	Sewell Lee Avery *vs.* Commissioner of Internal Revenue	Petition for Review of Order of the United States Board of Tax Appeals.

It is ordered by the Court that the petition for rehearing in this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 75 to 90, inclusive, contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, and a stipulation and order relating to the filing of briefs, and the Petition for a Rehearing) in the case of

Sewell Lee Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent,

No. 5029, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of December, A. D. 1933.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the fourth day of October, 1932, of the October Term, in the year of our Lord Nine Hundred and Thirty-Two, and of our Independence the One Hundred and Fifty-Seventh.

5030 Sewell Lee Avery *vs.* Commissioner of Internal Revenue } Petition for Review of Order of the United States Board of Tax Appeals

---

And afterwards, to-wit: On the eighteenth day of July, 1933, there was filed in the Office of the Clerk of this Court an Appearance of Counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5030. October Term, 1932.

Sewell L. Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

The Clerk will enter my appearance as counsel for Petitioner.

LELAND K. NEEVES,
134 So. La Salle St.
Chicago, Illinois.

Endorsed: Filed July 18, 1933. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-fourth day of July, 1933, there was filed in the Office of the Clerk of this Court an Appearance of counsel for Respondent, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5030. October Term, 1932.

Sewell Lee Avery, *Petitioner,*

vs.

Commissioner of Internal Revenue, *Respondent.*

The clerk will enter my appearance as counsel for Respondent.

PAT MALLOY,
SEWALL KEY,
Washington, D. C.

Endorsed: Filed July 24, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fourth day of July, 1933, there was filed in the Office of the Clerk of this Court an Affidavit of Service, Notice, Motion for Consolidation and for a Consolidated Transcript, and Affidavit in Support of Motion, which said Affidavit, Notice, Motion and Affidavit are not copied here as they are the same papers set out in full in the transcript of proceedings in this Court in cause No. 5029, Sewell Lee Avery *vs.* Commissioner of Internal Revenue, certified herewith.

And on the same day, to-wit: On the twenty-fourth day of July, 1932, an order was entered consolidating this cause with cause Number 5029, which said order is not copied here as it is the same order set out in full in the transcript of proceedings in this court in cause No. 5029, Sewell Lee Avery *vs.* Commissioner of Internal Revenue, certified herewith.

And afterwards, to-wit: On the twenty-fifth day of July, 1933, there was filed in the office of the Clerk of this Court a Motion for Substitution, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5030.

Sewell L. Avery,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

MOTION FOR SUBSTITUTION.

Comes now the above named petitioner and moves the court that Guy T. Helvering, Commissioner of Internal Revenue, be substituted for David Burnet as respondent herein, and in support of said motion respectfully shows:

1. That the resignation of said David Burnet, who was Commissioner of Internal Revenue when the petition for review in this proceeding was filed, was duly accepted and he ceased to be such officer on May 15, 1933.

2. That Guy T. Helvering was duly appointed and confirmed as Commissioner of Internal Revenue to succeed the said David Burnet; that he qualified as such officer and entered upon the duties of said office on June 6, 1933, since which date the said Guy T. Helvering has been and now is Commissioner of Internal Revenue.

3. That there is a substantial need for continuing and maintaining this proceeeding and obtaining an adjudication of the questions involved, for otherwise the order of the Unitd States Board of Tax Appeals herein sought to be reviewed will become final and the right to have the legality thereof determined will be extinguished.

This motion is made pursuant to the provisions of Section

11 of the Act of February 13, 1925, c. 229, 43 Stat. 941 (U. S. C., Title 28, Sec. 780).

Dated June 7, 1933.

LELAND K. NEEVES,
Attorney for Petitioner.

The undersigned, attorney for Guy T. Helvering, Commissioner of Internal Revenue, hereby expressly consents to the substitution sought by the above motion.

SEWALL KEY,
Special Assistant to the Attorney General, Attorney for Guy T. Helvering, Commissioner of Internal Revenue.

And on the same day, to-wit: On the twenty-fifth day of July, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, July 25, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

Sewell L. Avery 5030 *vs.* Commissioner of Internal Revenue	}	Petition for Review of Order of the United States Board of Tax Appeals.

Upon motion of the petitioner, expressly contended to by Guy T. Helvering, Commissioner of Internal Revenue, it is hereby ordered that said Guy T. Helvering, as such officer, be, and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue, and that this proceeding be so continued and maintained.

And afterwards, to-wit: On the twenty-first day of September, 1933, there was filed in the Office of the Clerk of this Court, an Appearance of counsel for Respondent, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5030. October Term, 1932.

Sewell L. Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

The Clerk will enter our appearance as counsel for respondent.

PAT MALLOY,
Asst. Attorney General.

SEWALL, KEY,
MORTON K ROTHSCHILD,
Special Assts. to the Attorney General,
Washington, D. C.

Endorsed: Filed September 21, 1933. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hundred and Fifty-eighth.

And on the same day, to-wit: On the third day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 3, 1933.

Court opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

	Sewell L. Avery	Petition for Review of Order of the United States Board of Tax Appeals.
5030	*vs.*	
	Commissioner of Internal Revenue	

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on October 19, 1933.

And afterwards, to-wit: On the nineteenth day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, October 19, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

	Sewell L. Avery	Petition for Review of Order of the United States Board of Tax Appeals.
5030	*vs.*	
	Commissioner of Internal Revenue	

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Leland K. Neeves, Counsel for Petitioner, and by Mr. John MacC. Hudson, Counsel for Respondent, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-sixth day of October, 1933, there was filed in the Office of the Clerk of this Court, the Opinion of the Court, which said Opinion is not copied here as it is the same opinion set out in full in the transcript of proceedings in this Court in cause No. 5029, Sewell Lee Avery *vs.* Commissioner of Internal Revenue, certified herewith.

And on the same day, to-wit: On the twenty-sixth day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, October 26, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

	Sewell L. Avery	Petition for Review of Order of the United States Board of Tax Appeals.
5030	*vs.*	
	Commissioner of Internal Revenue	

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the decision of the United States Board of Tax Appeals entered in this cause on February 2, 1933, be, and the same is hereby affirmed.

And afterwards, to-wit: On the fifteenth day of November, 1933, there was filed in the office of the Clerk of this Court a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the twenty-first day of November, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, November 21, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5030 Sewell L. Avery *vs.* Commissioner of Internal Revenue } Petition for Review of Order of the United States Board of Tax Appeals.

It is ordered by the Court that the petition for rehearing in this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages numbered from 93 to 100, inclusive, contain a true copy of the proceedings had and papers filed (excepting Affidavit of Service, Notice, Motion for Consolidation, and Affidavit in Support, filed July 24, 1933, order Consolidating causes entered July 24, 1933, and Opinion of the Court filed October 26, 1933, which are set out in full in the Transcript of Proceedings in this Court in cause No. 5029, Sewell Lee Avery *vs.* Commissioner of Internal Revenue, certified herewith; and Briefs of counsel, and Stipulation and order pertaining to the filing of briefs, and the Petition for a Rehearing) in the case of

Sewell L. Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

No. 5030, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of December, A. D. 1933.

FREDERICK G. CAMPBELL,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

[fol. 102] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1933.

No. 791

ORDER ALLOWING CERTIORARI—Filed March 19, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 103] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1933

No. 792

ORDER ALLOWING CERTIORARI—Filed March 19, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No.....

SEWELL LEE AVERY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SEWELL L. AVERY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of *certiorari* to review the judgments of the Circuit Court of Appeals for the Seventh Circuit, affirming certain decisions of the United States Board of Tax

Appeals, which said decisions confirmed deficiencies against petitioner for income taxes for the calendar years 1924 and 1929.

The deficiencies resulted from the holding that certain corporate dividends were taxable to petitioner in the years 1924 and 1929, respectively, rather than in 1925 and 1930, respectively, the years in which the dividends in question were reported by the petitioner.

QUESTIONS PRESENTED.

The same question is involved as to each of the years 1924 and 1925.

As to 1924—

> Were the dividends of $266,490.10 income for 1924 because of the fact that they were declared and payable in that year or were they income for 1925 as claimed by Petitioner because of the fact that the dividend checks were not actually received by him until 1925?

As to 1929—

> Were the dividends of $48,984 income for 1929 because of the fact that they were declared and payable in that year, or were they income for 1930 as claimed by Petitioner because of the fact that the dividend checks were not actually received by him until 1930?

Petitioner claims that the dividends in question were not received by him, within the meaning of the applicable provisions of the Revenue Acts, until the dividends actually came to hand through receipt of the dividend checks. Respondent, on the other hand, claims that the dividends were "received" by petitioner in the years in which the dividends were respectively declared and by their terms payable.

The Board of Tax Appeals sustained the Commissioner, and was in turn sustained by the court below. The Board in its opinion discussed the question at length. (Tr. 23-33.)

The opinion below (Tr. 87) attempts no extended discussion of the legal points involved.

STATEMENT.

Petitioner is a stockholder of United States Gypsum Company. In November, 1924, that company declared a dividend upon its stock, payable on or before December 31, 1924 to stockholders of record at the close of business on December 5, 1924 (Tr. 17). Dividend checks were mailed out to the stockholders on December 31, 1924, excepting that in the case of about fifty employees at the principal office of the company in Chicago, including Petitioner, the checks were held by the treasurer and not delivered until January 2, 1925. Petitioner, therefore received his dividends checks aggregating $266,490.10 on January 2, 1925 (Tr. 19-20).

These dividends were reported by Petitioner as income for the year 1925 (Tr. 17).

The practice followed by the company in sending out its dividend checks appears in detail in the record (pp. 20-22; 26-27) and will not be repeated here. The purpose and intent of the company was to preclude receipt by any stockholder of his dividends prior to January of the succeeding calendar year in each case.

In November, 1925, the company declared further dividends, payable on or before December 31, 1925 to stockholders of record at the close of business on

December 5, 1925 (Tr. 17-18). The dividends were paid in the same manner as in the case of the 1924 dividends, and Petitioner accordingly received his dividend checks on January 2, 1926 aggregating $161,511.70 (Tr. 19-20). These dividends were included in Petitioner's 1926 return (Tr. 17-18).

In November, 1926, a dividend was declared, payable on or before December 31, 1926 to stockholders of record at the close of business on December 4, 1926. The dividend was paid in the same manner, Petitioner receiving his dividend checks amounting to $140,117.30 on January 2, 1927 (Tr. 19-20), which dividends were included in Petitioner's 1927 return (Tr. 18).

In November, 1928, a dividend was declared, payable on or before December 31, 1928 to stockholders of record at the close of business on December 15, 1928 (Tr. 19). The dividend was paid in the same manner as before and Petitioner received dividend checks amounting to $32,656 on January 2, 1929 (Tr. 19-20) which were included in his 1929 return (Tr. 19).

In November, 1929, a dividend was declared, payable on or before December 31, 1929 to stockholders of record at the close of business on December 14, 1929 (Tr. 19). The dividend was paid in the same manner as before, Petitioner receiving checks aggregating $48,984 on January 2, 1930 (Tr. 19-20), which dividends were included in his 1930 return (Tr. 19).

Treating in each case the dividends in question as income for the year in which they were respectively declared and made payable and not as income for the year in which the dividend checks were actually

received by Petitioner, respondent increased Petitioner's 1924 income by the amount of the said dividends of $266,490.10; decreased his 1925 income by the amount of said last mentioned dividends and increased it by the amount of the said dividends of $161,511.70; decreased his 1926 income by the amount of the last mentioned dividends and increased it by the amount of the said dividends of $140,117.30 (Tr. 9-12); and decreased Petitioner's 1929 income by the amount of the said dividends of $32,656 and increased it by the amount of the said dividends of $48,984 (Tr. 50).

The following table shows the years in which the dividends were reported by Petitioner, together with the years in which the respondent claims they should be reported:

Year	Returns as Made	Returns as Adjusted
1924	.....	$266,490.10
1925	$266,490.10	161,511.70
1926	161,511.70	140,117.30
1927	140,117.30	.....
1928	.....	32,656.00
1929	32,656.00	48,984.00
1930	48,984.00	.....

The foregoing adjustments resulted in the asserted deficiency of $101,269.27 for 1924, [No. 5029 below] overassessments of $20,995.68 and $3,791.26 for 1925 and 1926, respectively, and the asserted deficiency of $2,658.13 for 1929. [No. 5030 below.]

The 1924 and 1929 deficiencies were appealed to the Board of Tax Appeals and were there affirmed. (Tr. 33, 63).

Both cases were appealed to the court below and

were there affirmed. The two cases were consolidated before the Board and were again consolidated in the court below and heard upon a single printed transcript (Tr. 81).

This petition is presented as to both cases.

The facts were mostly stipulated, and in any event were not disputed. They are set out in full in the record (Tr. 16-23).

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below is in conflict with the decisions of other Circuit Courts of Appeal upon the same question. There is complete lack of uniformity between the various circuits on the point.

2. The court below has decided an important question of Federal law, involving the construction and application of the Revenue Acts of 1924 and 1928, which has not been, but should be, settled by this court.

These reasons will be elaborated upon in the brief.

It is respectfully submitted, therefore, that the writ of certiorari herein prayed issue for the reasons urged.

JOHN E. MACLEISH,
LELAND K. NEEVES,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 67 Fed. (2d) 310, and appears on pages 87-89 of the transcript. The opinion of the Board of Tax Appeals appears in the transcript at pages 23-33, and is otherwise unreported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 26, 1933 (Tr. 89, 99). Petition for rehearing was denied on November 21, 1933 (Tr. 90, 100).

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. (Sec. 347, ch. 9, Title 28, U. S. C. A.)

QUESTIONS PRESENTED.

The questions presented are stated in the petition (*ante*, p. 2).

STATUTES INVOLVED.

The pertinent portions of the statutes involved are as follows:

Section 213 (a) of the Revenue Act of 1924 provides:

> "The term 'gross income' includes gains, profits and income derived from salaries, wages or

compensation for personal services * * *; also from interest, rent, dividends, securities * * * or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless under methods of accounting permitted under Subdivision (b) of Section 212 any such amounts are to be properly accounted for as of a different period."

Section 212 (b) of the 1924 act provides:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the methods of accounting regularly employed in keeping the books of such taxpayer, but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *"

Section 22 of the Revenue Act of 1928 provides:

"'Gross income' includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid * * *; also from interest, rent, dividends, securities * * * or gains or profits on income derived from any source whatever."

Section 42 of the 1928 Act provides:

"The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless under methods of accounting permitted under Section 41 any such amounts are to be properly accounted for as of a different period."

Section 41 of the 1928 Act is substantially the same as Section 212 (b) of the 1924 Act.

The pertinent provisions of the Regulations issued under the various Acts, appear in the Appendix (*Infra*, pp. 29-36).

STATEMENT.

A statement of the case is in the petition (*Ante*, p. 3).

ERRORS TO BE ASSIGNED.

I. THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN AFFIRMING THE JUDGMENT OF THE BOARD OF TAX APPEALS IN EACH OF THE TWO CASES.

II. THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN NOT HOLDING THAT THE DIVIDENDS HEREINBEFORE MENTIONED OF $244,690.10 AND $48,984, WERE INCOME FOR 1925 AND 1930 RESPECTIVELY, THE YEARS WHEN SAID DIVIDENDS WERE IN FACT RECEIVED BY PETITIONER.

III. THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN NOT REVERSING THE JUDGMENT AND FINDING OF THE BOARD OF TAX APPEALS IN EACH OF THE TWO CASES.

SUMMARY OF ARGUMENT.

I. Both the 1924 and 1928 Revenue Acts provide that all items of gross income, including dividends, shall be included in the taxpayer's gross income for the taxable period in which received by him, excepting only where other methods of accounting are permissible. This latter exception is not in-

volved in the instant case. The question here to be decided is whether certain dividends were taxable income to petitioner in 1924 and 1929, respectively, or in 1925 and 1930, respectively. The Commissioner claims that the dividends are taxable for the years first mentioned. The petitioner claims that they are taxable for the years last mentioned. Neither the 1924 nor the 1928 statute makes any distinction in reporting income as between dividends and all other items of income. These Acts differ in this regard from the 1921 Act which declared a special rule in Section 201(e) of that Act applicable to dividends alone and which Act in Section 213(a) expressly excepted dividends from the criterion of receipt, which criterion applied to all other items of income.

The dividends here involved were declared and made payable in 1924 and 1929, respectively. Dividend checks were sent out by the corporation on December 31st of each of the two years 1924 and 1929, which checks did not come into the possession of the petitioner until January 2, 1925 and 1930, respectively. Petitioner claims that the dividends were therefore "received" by him in 1925 and 1930, respectively, and should be reported accordingly. He did in fact report the dividends for those years. The Commissioner claims that the dividends were constructively received by petitioner in 1924 and 1929, respectively, because of the fact that the dividends were declared and made payable in those years. His contention is founded upon certain regulations issued by him to the effect that dividends are to be regarded as constructively received when made unqualifiedly subject to the taxpayer's demand.

These regulations adopted in substance the special provisions of Section 201(e) of the 1921 Act.

The word "received" in the 1924 and 1928 Acts is free from ambiguity and admits of no interpretation as is here attempted by the Commissioner. Petitioner received the dividends in question in fact in 1925 and 1930, respectively. The statute furnishes the sole measure as to when the dividends are to be reported. Under circumstances like those here involved, the First Circuit has held that the dividends are returnable in the year when the dividend checks actually come to hand. (*Commissioner* v. *Adams* (C. C. A. 1) 54 Fed. (2d) 228). The decision in the instant case and in *Shearman* v. *Commissioner* (C. C. A. 2) 66 Fed. (2d) 256, are to the contrary. The decision of the Sixth Circuit in *Commissioner* v. *Bingham,* 35 Fed. (2d) 503, in principle supports petitioner's contention because the decision there was expressly founded upon the special provisions of Section 201(e) of the 1921 Act.

II. The doctrine of constructive receipt is not applicable. The regulations under the 1921 Act embody in the subject of constructive receipt the substance of the provisions found in Section 201(e) of the 1921 Act. Whether such regulations correctly expounded the doctrine of constructive receipt as applied to dividends is immaterial as the regulations simply incorporated the statute itself and the regulations have only such meaning as the statute itself has. Section 201(e) of the 1921 Act did not deal with the question of constructive receipt but declared an arbitrary measure for taxing dividends, separate and distinct from all other items of income. Actual or constructive receipt of the dividend un-

der the 1921 Act was immaterial. It was only necessary that the cash or property should be made unqualifiedly subject to the shareholder's demand. Under the 1921 Act, according to the *Bingham* case, the mailing of the dividend check was relevant only as to the fact as to whether the cash or property was so unqualifiedly subject to the shareholders demand.

The special provisions of Section 201(e) of the 1921 Act were omitted from the 1924 and subsequent Acts. Nevertheless, the Commissioner carried forward into his regulations under these later Acts the same provision as appeared in his regulations under the 1921 Act. The difference now is that such regulations no longer have the express support of the statute. The 1924 and subsequent Acts changed the law as to the reporting of dividends. The regulations issued under these later Acts as here sought to be applied by the Commissioner are therefore void as in violation of the statute. The Commissioner has no power to legislate under the guise of regulations. The essence of the doctrine of constructive receipt is that the fund is actually within the dominion and control of the taxpayer and it is only due to his own voluntary act or conduct that such income is not actually reduced to possession. It is not to be confused with accrual accounting. Here, while the dividends were due on December 31st and petitioner thereafter, if the same were not paid, could maintain an action against the corporation therefor, the corporation chose to make payment by delivery of the dividend checks in such manner as to preclude their receipt by the shareholders until January of the following years respectively. This delay in the transmittal of the dividend checks was not due to the voluntary act or con-

duct of petitioner or of the other stockholders and therefore they cannot be said to have constructively received the dividends prior to the date of their actual receipt when the dividend checks actually came to hand. The cases where dividends and other items of income have been credited to the taxpayer's acaccount upon the corporate books upon which account the taxpayer has the right to draw at will, are clearly distinguishable from cases like the present.

III. The instant case which involves the largest deficiency—$101,269.27—arises under the 1924 Act. Technically, therefore, the *Shearman* case is distinguishable from the instant case as to the latter deficiency for the reason that the *Shearman* case went off on the proposition that the enactment of the 1926 and 1928 Acts (the *Shearman* case involved the 1928 Act) carried with them the regulations issued under the 1924 Act. The rule as to a legislative adoption of an administrative construction of a prior statute does not apply to the same extent or with the same force as in a case like the present where the court is dealing with the 1924 Act itself. Upon the principle, however, applied under certain circumstances, that such legislative adoption of an administrative construction of a prior Act is a legislative approval of that construction of such prior Act the *Shearman* case is probably to be taken as opposed to petitioner's contention. To that extent it is in conflict with the *Adams* case. The court below in the instant cases applies the rule both as to the 1924 and 1928 Acts and to that extent it is also in conflict with the *Adams* case.

The Commissioner may not legislate under the guise of administrative regulations.

ARGUMENT.

I.

THE DIVIDENDS OF $266,490.10 AND $48,984.00 WERE ACTUALLY RECEIVED ON JANUARY 2, 1925, AND JANUARY 2, 1930, RESPECTIVELY, WHEN THE DIVIDEND CHECKS ACTUALLY CAME TO HAND. AS INCOME, THE DIVIDENDS WERE TAXABLE IN SAID YEARS, RESPECTIVELY.

There is no question but that the dividend resolutions under which petitioner received the dividends here involved provided that the dividends thus declared should be payable to the stockholders on or before December 31 of the years 1924 and 1929, respectively. The fact remains, however, that for reasons sufficient to the corporation, and among other things to insure that no stockholder should receive his dividend check until January 2nd, petitioner did not come into possession of his dividends until January of 1925 and 1930 respectively. The legal question is therefore as to whether the dividends, under such circumstances, were "received" by petitioner, under the applicable provisions of the 1924 and 1928 Acts, when in fact received by him through receipt of the checks or were received for tax purposes in the years, respectively, in which the dividends by the resolutions in question were declared to be payable.

There are only three Court of Appeals decisions upon the question arising under the 1924 or subsequent Revenue Acts.

Commission v. *Adams* (1st Circuit), 54 Fed. (2d) 228.

Shearman v. *Commissioner* (2nd Circuit), 66 Fed. (2d) 256.

Avery v. *Commissioner* (7th Circuit) 67 Fed. (2d) 310. (The instant case.)

The *Adams* case involved the 1924 Act, the *Shearman* case the 1928 Act, and the instant case both the 1924 and 1928 Acts.

In addition to the foregoing, the case of *Commissioner* v. *Bingham*, involving the 1921 Act, was decided by the Sixth Circuit—35 Fed. (2d) 503.

The conflict between the various courts of appeal appears from a consideration of the above cases.

The 1921 Act, in Section 213(a) thereof, after defining gross income, provided that the amount of all items of gross income "except as provided in Subdivision (e) of Section 201" should be included in gross income for the taxable year in which *received* by the taxpayer. (Italics ours). Section 201(e) of the 1921 Act provided "For the purpose of this Act a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands".

In the *Bingham* case it appeared that the corporation had mailed out dividend checks on December 31 and were received by Bingham in January of the year following. He reported the dividends as income for the year in which the dividend checks actually came into his possession. The Commissioner insisted that the dividends were income for the year in which they were declared and payable. The Board, by a bare majority, sustained Bingham's position. (8 B. T. A. 603). The majority attached no especial significance to the provisions of Section 201(e) above and held that the dividends were received when the dividend checks came into the hands of the taxpayer. Some of the dissenting

members were of the opinion that the majority decision wholly ignored the provisions of Section 201(e) and that those provisions were controlling and required a finding against the taxpayer. The Commissioner appealed and the Sixth Circuit Court of Appeals reversed the Board on the ground that Section 201(e) of the Act set up a special rule as to dividends and was controlling. The court expressly pointed out that dividends were specifically excluded from the general provision in Section 213(e) and that the "reason for such exclusion, of course, was that an entirely different basis for fixing the tax year for dividends had already been established in Section 201(e), which section must control". It was further said that "the important thing is that the shareholder did receive a dividend, not when or how. Having received it, the statute (Section 201(e)) required that it be included in his gross income as of the date *not when received* but when the cash (for this was a cash dividend) was unqualifiedly made subject to his demand". (Italics ours). The mailing of the dividend checks was deemed relevant only to the point as to whether the cash or other property was unqualifiedly made subject to the shareholder's demands on the payable date of the dividend and the date when the checks were actually sent out and that the sending out of the checks was sufficient evidence that such cash or property was in fact unqualifiedly made subject to the shareholder's demands. This court denied certiorari.

The whole tenor of the opinion, we submit, indicates that except for the special provisions in Section 201 (e) of the 1921 Act, the decision of the Board would have been sustained.

In the *Adams* case, a similar situation existed as in the *Bingham* case, excepting that the dividend resolution expressly provided that the dividend checks should be mailed out on December 31. The case, as we have said, arose under the 1924 Act. The Board held for the taxpayer, pointing out both the special provision in the dividend resolution there involved and also that Section 201(e) of the 1921 Act had been omitted in the 1924 Act. The Commissioner appealed and the First Circuit affirmed. The court pointed out that the decision in the *Bingham* case rested upon the special provisions of the 1921 Act and that those provisions had been omitted from the 1924 Act. It was said that the 1924 Act did not only not contain the special provisions in the 1921 Act but that in Section 213 (a) it expressly provided that dividends should be included in gross income for the taxable year in which received by the taxpayer. It was further held that the language of the statute was clear and free from ambiguity and that to the extent that the regulations expressed any different rule for reporting dividends they were ineffective.

The Commissioner did not apply for certiorari.

In the *Shearman* case, the dividends were payable December 31, 1928 to stockholders of record at the close of business on that day. Dividend checks were mailed to Mrs. Shearman on December 31 in the usual course of business and after the stock transfer books had been closed. The checks were received in the mail on January 2, 1929. The court said that the *Adams* case was distinguishable because of the special provision in the dividend resolution there involved, and then held that the enactment of the 1926 and 1928 Acts carried with them the administrative

construction of the 1924 Act embraced in the regulations issued under the latter Act and that, therefore, the dividends were to be deemed as "constructively received" in 1928.

Mrs. Shearman did not apply for certiorari.

In the *Shearman* case the Board followed an intermediate decision which was not appealed and which had been decided by the Board before the First Circuit had decided the *Adams* case. (*Re Braxton*, 22 B. T. A. 128.) In the *Braxton* case there was wide divergence of view in the Board.

The instant case was the next and last decision by any Court of Appeals upon the point. As we have pointed out, it involves both the 1924 and 1928 Acts. Technically, the decision in the *Shearman* case is distinguishable, at least as to No. 5029 below which involved the asserted deficiency of $101,269.27 for the year 1924.

The court below in the instant case goes beyond the holding of the *Shearman* case. Its conclusion is that, without more, dividends under such circumstances are income for the year in which they are declared and made payable. The reason given is "that a stockholder of a corporation which has declared a dividend payable before a certain date is on said date entitled to the sum thus declared as a dividend. His right thereto is traceable to the corporate action declaring the dividend, not to the check. The latter merely evidences the liability. It does not create the liability. The date the liability attaches rather than the date of the check which evidences the liability governs". (Tr. 89).

The court thus makes the due date of the dividend the criterion, not the receipt of the dividend by the

stockholder which is the criterion established by the statute. To that extent the court below treats an "accrual" as the equivalent of receipt, although the taxpayer is reporting upon a cash receipts basis. Even the 1921 Act did not make the payable date the sole criterion of taxability, nor do the regulations under the 1924 and subsequent Acts make the payable date of the dividend such criterion. With all deference to the court below, its opinion in this case evidences a confusion of thought as to what is intended by the word "received".

Articles 52 and 1541 of Regulation 65 (1924) and Articles 333 and 621 of Regulation 74 (1928), although there are some differences in phraseology, evidently intend to adopt the substance of the provisions found in Section 201(e) of the 1921 Act. If these regulations are valid as applied by the Commissioner to cases such as the instant case, there being no provision in the 1924 or 1928 Acts equivalent to Section 201(e) of the 1921 Act, then it is a necessary conclusion that Section 201(e) of the 1921 Act was a wholly unnecessary provision. That that section, however, cannot be regarded as surplusage follows, we submit, from the decision in the *Bingham* case and also follows from principle. If Section 201(e) of the 1921 Act was merely intended to provide for the application of the doctrine of constructive receipt to dividends, Section 213(a) of the 1921 Act would be reduced to an absurdity so far as dividends are concerned for it would then read in effect that all items of gross income except dividends are to be reported for the taxable period in which received by the taxpayer but that dividends are to be reported for the taxable period in which constructively received. This construction of Section

213(a) is not only absurd but it would result in the possibility of excluding all other items of income from the doctrine of constructive receipt in accordance with the maxim *expressio unius est exclusio alterius*. That it required no such provision as is found in Section 201(c) of the 1921 Act, to subject dividends to the doctrine of constructive receipt is apparent from *Hadley* v. *Commissioner* (App. D. C.) 36 Fed. (2d) 543 and *Brooks* v. *Commissioner* (4th Circuit) 35 Fed. (2d) 178, both of which cases arose under statutes prior to that of 1921 and subjected dividends to tax upon the theory of constructive receipt upon the same principles as applied to other types of income.

The application by the Board of the doctrine of constructive receipt to the matter of dividends under circumstances like those in the instant case is not only inconsistent with its own views otherwise expressed as to the real meaning and effect of that doctrine, but is obviously colored by a mistaken view of the decision of the Sixth Circuit in the *Bingham* case. It is our view, and we respectively urge, that the decision in the *Bingham* case was correct and in accordance with principle under the 1921 Revenue Act and that the decision in the *Adams* case was correct and in accordance with principle under the 1924 Act wholly apart from the special provision in the dividend resolution there involved. The *Shearman* and the instant cases are contrary to the *Adams* case and contrary, we submit, to the principle recognized in the *Bangham* case.

The 1924 and 1928 Acts tax all income when received, excepting only in the case of other allowable methods of returning income which latter methods

are not involved here. No distinction exists as between dividends and other items of income.

The *Shearman case* gives recognition to the Regulations of the Commissioner to the extent of subjecting dividends to tax upon the basis of constructive receipt where the dividends are payable and the checks are mailed out on December 31st.

The court below in the instant case declares dividends to be taxable as of their due date, without more. In other words, if a dividend is due and payable on December 31 of a given year, the stockholder is obliged to pay a tax thereon, without any regard to whether the dividends are then in fact paid or whether the funds are even then available for payment.

With all due deference, the court below misconceives the essential question. The declaration of a dividend, of course, creates a debt from the corporation to the stockholder. That debt matures upon the day when the dividend is by the resolution declaring it made due and payable, and if the dividend is not paid on that day, the stockholder obviously may maintain an action to recover it. None of this, however, constitutes the receipt of such dividend for tax purposes. Rent or interest may be due during a certain taxable period, but rent or interest is not income *received* merely because due. The only basis on which such items under such circumstances are taxable as income is upon the basis of accrual accounting.

The court below specifically lays aside any question with respect to the mailing of the dividend checks as having any bearing upon the subject with the statement that the right of the stockholder arises

from the declaration of the dividend and not from the check. It is said that the check evidences the liability but does not create it. Obviously, the check is merely the means of paying the dividend or, in other words, discharging the liability. It neither creates nor evidences the liability.

If, therefore, the principle is applied in the taxing of dividends in the Seventh Circuit as laid down by the court in the instant case, then taxpayers in the Seventh Circuit pay a tax upon all dividends as of the year in which the dividends are payable, without any regard whatsoever to whether the dividends are in fact paid or whether the corporation has the means of paying them. Under such circumstances, the taxpayer is taxed, not upon income received, but upon something which he has not yet received.

In the Second Circuit, however, under the principles announced in the *Shearman case,* the taxpayer pays a tax upon dividends for the year in which the dividends are payable only in the event that the funds are then and there available for payment, in which event the mailing out of the dividend check is to be taken as evidence that the funds are so available (compare *Commissioner* v. *Bingham,* C. C. A. 6th, 35 Fed. (2d) 503). In the *Bingham* case the holding is based upon express statute. In the *Shearman* case it rests only upon an administration regulation.

In the First Circuit, under the *Adams case,* however, a taxpayer is not taxed upon dividends until the dividend checks come to hand.

Apart from the subject of accrual accounting, and with the sole exception of the special dividend pro-

visions in the 1921 Act, our income tax laws have taxed income of all kinds upon the basis of receipt.

The 1921 Act also taxed income upon the basis of receipt, excepting only dividends, which were dealt with specially. The 1924 and all of the subsequent Acts tax all income upon the basis of receipt. Such has been the persistent legislative policy.

The Board of Tax Appeals in the instant case expressly stated that its holding in the *Shearman* and other like cases were not in harmony with certain of the language used by the court in the *Adams case*. It was nevertheless of the opinion that it should follow its own decisions and that, with due deference to the First Circuit Court of Appeals in the *Adams case*, it felt that until other Circuit Courts of Appeal had spoken on the question, it should not abandon the view which it had theretofore adopted and followed (Tr. 32-33). It has since adhered to its view. (*Re Peck*, 29 B. T. A. .....; January 23, 1934.)

II.

THE DOCTRINE OF CONSTRUCTIVE RECEIPT IS NOT APPLICABLE.

We have set out in the Appendix the relevant provisions of the various Regulations issued under the various Acts upon the subject of constructive receipt. That doctrine is an administrative concept of the statutory word "received." But, as has been said by the Board (*Re Cowell*, 18 B. T. A. 997, 1001),

> "Unless it is kept within the penumbra of actual receipt, it will invade the field of accrual accounting, and this should not be permitted."

The case of *Re Brander*, 3 B. T. A. 231, is perhaps

the leading Board case upon the subject. It was there said:

> "* * * This doctrine, as we have made clear in several appeals, is not to be applied lightly, but only in situations where it is clearly justifiable. When taxable income is consistently computed by a citizen on the basis of actual receipts, a method which the law expressly gives him the right to use, he is not to be defeated in his bona fide selection of this method by 'construing' that to be received of which in truth he has not had the use and enjoyment. Constructive receipt is an artificial concept which must be sparingly applied, lest it becomes a means for taxing something other than income and thus violating the Constitution itself.
>
> "Doubtless, however, there are clear cases of constructive receipt, such, for example, as that of the bond owner who chooses not to cash his coupon but to permit it to remain uncut in the possession of another. He will not be heard to say that the amount of the coupon is not his income because he did not in fact receive it. The receipt is entirely within his own control and disposition."

Upon occasions, as we have pointed out, dividends have been made the subject of the application of the doctrine of constructive receipt, under circumstances warranting the application of that doctrine. *Hadley* v. *Commissioner*, App. D. C., 36 Fed. (2d) 543; *Brooks* v. *Commissioner*, C. C. A. 4, 35 Fed. (2nd) 178.

In those cases the dividends were actually credited to the stockholder's account upon the corporate books, along with salaries, rents, interest and other items due from the company, and the taxpayer had the right to draw and did draw indiscriminately

against the amount standing in the account to his credit. It would seem apparent that under such circumstances the taxpayer had "received" the dividends for tax purposes.

In the case of the bond interest coupon maturing in a given year, the taxpayer has received during that year, and is in actual possession of, the symbol of the debt, namely, the coupon itself, in which case it may properly be regarded that the income or interest represented by the coupon has been "constructively" received as of the due date of the coupon. Such a case, however, is distinguishable from an ordinary case of interest merely accruing upon a debt which is unpaid. In the latter situation, such interest is not "received" merely because it is past due.

The essence of the doctrine of constructive receipt is that the fund is in fact within the control of the taxpayer and the failure to reduce the fund to actual possession is due to the taxpayer's own voluntary act or conduct. The case of the taxpayer who has a running account with the corporation in which are credited various items of salary, interest, dividends, etc. and upon which account the taxpayer has the right to draw at will, is an example of constructive receipt. Such is not the situation in the present case. Failure to receive the dividend was not due to Petitioner's voluntary act or conduct but was due to the action of the corporation in withholding actual payment until the year subsequent to the payable date of the dividend. Confusion seems to exist with respect to the bearing of the *Bingham* case upon the subject of constructive receipt. That decision did not rest upon any doctrine of constructive receipt but was based upon the special provisions of the Rev-

enue Act of 1921 which made the test of taxability the fact that the cash or property for the payment of the dividend was made available to the shareholder. The mailing of the dividend check there was treated merely as evidence that such cash or property was in fact available on the day the dividends were otherwise payable.

III.

THE COMMISSIONER MAY NOT BY MERE REGULATION CHANGE OR ENLARGE THE CLEAR MEANING OF THE STATUTE.

The applicable statutes state explicitly that all items of income are to be included in the taxable period in which *received* by the taxpayer. The 1921 Act made a special rule as to dividends. That special rule in the 1921 statute was carried into the regulations issued under that statute verbatim. (Arts. 53, 1541; Reg. 62; App. pp. 29-30). Notwithstanding the omission of these special provisions in the 1924 and subsequent acts, the regulations issued in this respect under the 1921 Act were carried forward into the regulations under the later Acts without material change. Obviously, if the 1924 and subsequent acts materially changed the law as to reporting dividends from what it was under the 1921 Act, the regulations under the 1924 and subsequent acts to the extent as here applied, are in direct violation thereof, and are, therefore, void. While administrative construction of a statute may be looked to in order to resolve an ambiguity, resort to such construction will not be permitted to create one. (*R. R. Commission* v. *C. B. & Q. R. Co.*, 257 U. S. 363). Where a statute is free

from ambiguity then administrative construction thereof is immaterial, (*Swift, etc. Co.* v. *U. S.*, 105 U. S. 691; *Iselin* v. *U. S.*, 270 U. S. 245), no matter of how long standing such administrative construction may have been. (*U. S.* v. *Graham*, 110 U. S. 219; *U. S.* v. *Johnson*, 173 U. S. 363).

The *Shearman* case passing upon the 1928 Act held that the enactment of the 1926 and 1928 Acts carried with it the administrative construction of the Commissioner of the 1924 Act. While we do not question the abstract principle thus applied by the Second Circuit in that case and while, under certain circumstances, the re-enactment of the statute may be regarded as a legislative approval of the administrative practice and construction under the prior statute if otherwise reasonable (*Massachusetts Mutual Life Ins. Co.* v. *U. S.*, 288 U. S. 269; *Brewster* v. *Gage*, 280 U. S. 327), the rule is by no means inflexible, and there again, if the statute is clear, the principle does not apply. (*Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 757-9). The First Circuit held in the *Adams* case that there was no such ambiguity in the statute as warranted any administrative construction thereof to the extent attempted in the regulations upon the subject of constructive receipt under the 1924 Act so far as they applied to dividends, or at least to the extent as claimed by the Commissioner in cases like the present.

The *Shearman* case is in conflict with the *Adams* case in this respect and so is the instant case through its approval of the construction and reasoning of the *Shearman* case. In other words, in the First Circuit, the Commissioner's regulations upon the subject of constructive receipt, as applied to dividends, are

void, but are valid in the Second and Seventh Circuits.

Besides the conflict as between the various circuits, the question is a general one involving the construction of the Revenue Acts of 1924 and 1928 and the power of the Commissioner to construe this statute as he has done, questions which should be passed upon and settled by this court once and for all.

We respectfully submit that the writ of certiorari should be granted to the end that upon a hearing the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed.

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Counsel for Petitioner.

APPENDIX.

1921 Act—Regulations 62.

Article 51. *When included in gross income.*—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him. See articles 21-24; as to dividends, see section 201(e) and articles 1541-1549. * * *

Article 52. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

Article 53. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the

year during which the coupons matured. This is true if the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder. See section 201 of the statute and articles 1541-1549.* * * * Interest credited on savings bank deposits, even though the bank nominally have a rule, seldom or never enforced, that it may require so many days' notice in advance of cashing depositors' checks, is income to the depositor when credited. * * *

ARTICLE 1541. *Dividends.* * * * *A taxable distribution made by a corporation to its stockholders or members shall be included in the gross income of the distributees when the cash or other propertly is unqualifiedly made subject to their demands. See article 53.*

1924 ACT—REGULATIONS 65.

ARTICLE 50. *When included in gross income.*—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him. See articles 21-24. * * *

ARTICLE 51. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not

credited, but is set apart, such income must be unqualified subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 52. *Examples of constructive receipt.*— When interest coupons have matured and are payable, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. This is true if the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder.* * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice in advance of cashing depositors' checks, is income to the depositor when credited. * * *

ARTICLE 1541. *Dividends.* * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 52.*

1926 ACT—REGULATIONS 69.

ARTICLE 50. *When included in gross income.*— Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. See articles 21-24. * * *

ARTICLE 51. *Income not reduced to possession.*—

Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 52. *Examples of constructive receipt.*— When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. This is true if the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder.* * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. * * *

ARTICLE 1541. *Dividends.* * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 52.*

ARTICLE 331. *When included in gross income.*—Gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. See articles 321-323. * * *

ARTICLE 332. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 333. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, shall be included in gross income for the year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. The interest shall be included in gross income even though the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax*

when unqualifiedly made subject to the demand of the shareholder. * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. * * *

ARTICLE 621. *Dividends.*— * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 333.*

1932 ACT—REGULATIONS 77.

ARTICLE 331. *When included in gross income.*— Gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. See articles 321-323. * * *

ARTICLE 332. *Income not reduced to possession.*— Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 333. *Examples of constructive receipt.*— When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, shall be included in gross income for the year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. The interest shall be included in gross income even though the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder.* * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. * * *

ARTICLE 621. *Dividends.*— * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 333.*

1918 ACT—REGULATIONS 45.

ARTICLE 52. *When included in gross income.*— Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him. See articles 21-24. * * * .

ARTICLE 53. *Income not reduced to possession.*— Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute

receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until the termination of five years of employment, the mere crediting on the books of the corporation does not constitute receipt. The distinction between receipt and accrual must be kept in mind. Income may accrue to the taxpayer and yet not be subject to his demand or capable of being drawn on or against by him."

ARTICLE 54. *Examples of constructive receipt.*— Where interest coupons have matured, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. This is so if the coupons are exchanged for other property instead of eventually being cashed. *Dividends on corporate stock are subject to tax when set apart for the stockholder, although not yet collected by him. See section 201 of the statute and articles 1541-1549.* * * *

ARTICLE 1541. *Dividends.*—* * * *The mere declaration of a dividend is not a distribution. Dividends are income and are taxed at the rates for the year in which paid, regardless of when the earnings or profits out of which they were paid were accumulated.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 791-792

SEWELL LEE AVERY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SEWELL L. AVERY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER.

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THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SEWELL L. AVERY,
Petitioner,

vs.

GUY T. HELVERING, COMMISSONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF PETITIONER.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The United States Board of Tax Appeals confirmed deficiencies against petitioner of $101,269.78 and $2,658.13 for income taxes for the calendar years 1924 (R. 9) and 1929 (R. 50) respectively (R. 33; 63). Upon appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the judgments of the Board were affirmed (R. 89; 99). Certiorari was granted here.

The cases were consolidated for hearing before the Board (R. 23; 52) and also in the court below (R. 81; 94).

OPINIONS BELOW.

The opinion below appears in the record at pages 87 and is also reported in 67 Fed. (2d) 310. The opini of the Board appears in the record at pages 23-33 a pages 52-62 and is otherwise unreported.

JURISDICTION.

The judgment of the Circuit Court of Appeals of t Seventh Circuit was entered on October 26, 1933 (R. 8 99) and petition for rehearing was denied on Novemb 21, 1933 (R. 90, 100). A petition for certiorari was file in this court on February 16, 1934, pursuant to Sectio 240-A of the Judicial Code as amended by the Act February 13, 1925, (Sec. 347, ch. 9, Title 28, U. S. C. A. Certiorari was granted on March 19, 1934.

STATEMENT OF THE CASE.

The cases were tried upon a stipulation of facts (R. 16; 20) and upon certain additional testimony (R. 20-33). The testimony related to the practice followed by the corporation whose dividends are here involved—United States Gypsum Company—in the transmission to its stockholders of its dividend checks (R. 20-22; 26-27). There is no dispute with respect to any of the testimony or as to any of the facts.

Petitioner is a stockholder of United States Gypsum Company. In November, 1924, that company declared a dividend upon its stock, payable on or before December 31, 1924 to stockholders of record at the close of business on December 5, 1924 (R. 17). Dividend checks were mailed out to the stockholders on December 31, 1924, excepting that in the case of about fifty employees at the principal office of the company in Chicago, including Petitioner, the checks were held by the treasurer and not delivered until January 2, 1925. Petitioner received his dividend checks aggregating $266,490.10 on January 2, 1925 (R. 19-20).

These dividends were reported by Petitioner as income for the year 1925 (R. 17).

In November, 1925, the company declared further dividends, payable on or before December 31, 1925 to stockholders of record at the close of business on December 5, 1925 (R. 17-18). The dividends were paid in the same manner as in the case of the 1924 dividends, and Petitioner accordingly received his dividend checks on January 2, 1926, aggregating $161,511.70 (R. 19-20). These dividends were included in Petitioner's 1926 return (R. 17-18).

In November, 1926, a dividend was declared payable on or before December 31, 1926 to stockholders of record at the close of business on December 4, 1926. The dividend was paid in the same manner, Petitioner receiving his dividend checks amounting to $140,117.30 on January 2, 1927 (R. 19-20), which dividends were included in Petitioner's 1927 return (R. 18).

These are the three dividend payments involved in No. 791.

In November, 1928, a dividend was declared, payable on or before December 31, 1928 to stockholders of record at the close of business on December 15, 1928 (R. 19). The dividend was paid in the same manner as before and Petitioner received dividend checks amounting to $32,656 on January 2, 1929 (R. 19-20) which were included in his 1929 return (R. 19).

In November, 1929, a dividend was declared, payable on or before December 31, 1929 to stockholders of record at the close of business on December 14, 1929 (R. 19). The dividend was paid in the same manner as before, Petitioner receiving checks aggregating $48,984 on January 2, 1930 (R. 19-20), which dividends were included in his 1930 return (R. 19).

These are the two dividend payments involved in No. 792. The Commissioner claims that the $32,656 should have been reported as income for the year 1928, and not for the year 1929; and that the $48,984 should have been reported for 1929, and not 1930.

Treating in each case the dividends in question as income for the year in which they were respectively declared and made payable and not as income for the year in which the dividend checks were actually received by Petitioner, respondent increased Petitioner's 1924 in-

come by the amount of said said dividends of $266,490.10; decreased his 1925 income by the amount of said last mentioned dividends and increased it by the amount of said dividends of $161,511.70; decreased his 1926 income by the amount of the last mentioned dividends and increased it by the amount of the said dividends of $140,117.30 (R. 9-12); and decreased Petitioner's 1929 income by the amount of the said dividends of $32,656 and increased it by the amount of the said dividends of $48,984 (R. 50).

The following table shows the years in which the dividends were reported by Petitioner, together with the years in which the respondent claims they should be reported:

Year	Return as Made	Return as Adjusted
1924	.....	$266,490.10
1925	$266,490.10	161,511.70
1926	161,511.70	140,117.30
1927[1]	140,117.30	.....
1928[1]	.....	32,656.00
1929	32,656.00	48,948.00
1930	48,984.00	.....

The foregoing adjustments resulted in the asserted deficiency of $101,269.27 for 1924, [No. 791] overassessments of $20,995.68 and $3,791.26 for 1925 and 1926, respectively (R. 10, 11), and the asserted deficiency of $2,658.13 for 1929. [No. 792.]

1. Petitioner's 1927 and 1928 returns are pending before the Department without any final audit thereof.

ASSIGNMENT OF ERRORS.

I. The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the Board of Tax Appeals in each of the two cases.

II. The Circuit Court of Appeals for the Seventh Circuit erred in not holding that the dividends hereinbefore mentioned of $266,690.10 and $48,984, were income for 1925 and 1930 respectively, the years when said dividends were in fact received by Petitioner.

III. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the judgment and finding of the Board of Tax Appeals in each of the two cases.

SUMMARY OF ARGUMENT.

I. Both the 1924 and 1928 Revenue Acts provide that all items of gross income, including dividends, shall be included in the taxpayer's gross income for the taxable period in which received by him, excepting only where other methods of accounting are permissible. This latter exception is not involved in the instant case. The question here to be decided is whether certain dividends were taxable income to petitioner in 1924 and 1929, respectively, or in 1925 and 1930, respectively. The Commissioner claims that the dividends are taxable for the years first mentioned. The petitioner claims that they are taxable for the years last mentioned. Neither the 1924 nor the 1928 statute makes any distinction in reporting income as between dividends and all other items of income. These Acts differ in this regard from the 1921 Act which declared a special rule in Section 201(e) of that Act applicable to dividends alone and which Act in Section 213(a) expressly excepted dividends from the criterion of receipt, which criterion applied to all other items of income, except in the case of accrual accounting.

The dividends here involved were declared and made payable in 1924 and 1929, respectively. Dividend checks were sent out by the corporation on December 31st of each of the two years 1924 and 1929, which checks did not come into the possession of the petitioner until January 2, 1925 and 1930, respectively. Petitioner claims that the dividends were therefore "received" by him in 1925 and 1930, respectively, and should be reported accordingly. He did in fact report the dividends for those years. The Commissioner claims that the dividends were constructively received by petitioner in 1924 and 1929, respectively, because of the fact that the dividends were declared and made payable in those years. His conten-

tion is founded upon certain regulations issued by him to the effect that dividends are to be regarded as constructively received when made unqualifiedly subject to the taxpayer's demand. These regulations adopted in substance the special provisions of Section 201(e) of the 1921 Act.

The word "received" in the 1924 and 1928 Acts is free from ambiguity and admits of no interpretation as is here attempted by the Commissioner. Petitioner received the dividends in question in fact in 1925 and 1930, respectively. The statute furnishes the sole measure as to when the dividends are to be reported. Under circumstances like those here involved, the First Circuit has held that the dividends are returnable in the year when the dividend-checks actually come to hand. (*Commissioner* v. *Adams*, C. C. A. 1, 54 Fed. (2d) 228). The decision of the Sixth Circuit in *Commissioner* v. *Bingham*, 35 Fed. (2d) 503, in principle supports petitioner's contention because the decision there was expressly founded upon the special provisions of Section 201(e) of the 1921 Act. The decision in the instant cases and in *Shearman* v. *Commissioner*, C. C. A. 2, 66 Fed. (2d) 256, are to the contrary.

II. The doctrine of constructive receipt is not applicable. The regulations under the 1921 Act embody in the subject of constructive receipt the substance of the provisions found in Section 201(e) of the 1921 Act. Whether such regulations correctly expounded the doctrine of constructive receipt as applied to dividends is immaterial as the regulations simply incorporated the statute itself and the regulations have only such meaning as the statute itself has. Section 201(e) of the 1921 Act did not deal with the question of constructive receipt but declared an arbitrary measure for taxing dividends, separate and distinct from all other items of income. Actual or constructive receipt of the dividend under the

1921 Act was immaterial. It was only necessary that the cash or property should be made unqualifiedly subject to the shareholder's demand. Under the 1921 Act, according to the *Bingham* case, the mailing of the dividend check was relevant only as to the fact as to whether the cash or property was so unqualifiedly subject to the shareholders demand.

The special provisions of Section 201(e) of the 1921 Act were omitted from the 1924 and subsequent Acts. Nevertheless, the Commissioner carried forward into his regulations under these later Acts the same provision as appeared in his regulations under the 1921 Act. The difference now is that such regulations no longer have the express support of the statute. The 1924 and subsequent Acts changed the law as to the reporting of dividends. The regulations issued under these later Acts as here sought to be applied by the Commissioner are therefore void as in violation of the statute. The Commissioner has no power to legislate under the guise of regulations. The essence of the doctrine of constructive receipt is that the fund is actually within the dominion and control of the taxpayer and it is only due to his own voluntary act or conduct that such income is not actually reduced to possession. It is not to be confused with accrual accounting. Here, while the dividends were due on December 31st and petitioner thereafter, if the same were not paid, could maintain an action against the corporation therefor, the corporation chose to make payment by delivery of the dividend checks in such manner as to preclude their receipt by the shareholders until January of the following years respectively. This delay in the transmittal of the dividend checks was not due to the voluntary act or conduct of petitioner or of the other stockholders and therefore they cannot be said to have constructively received the dividends prior to the date of their actual receipt when the dividend checks actually

came to hand. The cases where dividends and other items of income have been credited to the taxpayer's account upon the corporate books upon which account the taxpayer has the right to draw at will, are clearly distinguishable from cases like the present.

III. The instant case which involves the largest deficiency—$101,269.27—arises under the 1924 Act.

The *Shearman* case rested upon a principle of statutory construction not entirely applicable to No. 791, that is, a case arising under the 1924 Act. The power given to the Commissioner to issue regulations for the administration of the Act is not of itself power to the Commissioner to change or vary the meaning of the statute. Where a statute is clear and free from ambiguity, the Commissioner has no power to change it by administrative construction no matter of how long standing such administrative construction may have been. The word "received" in the statute is not ambiguous. While under the 1924 and subsequent Acts, dividends as well as other items of income may under proper circumstances be regarded as constructively received, the Commissioner in applying that doctrine may not exercise arbitrary or unreasonable power and it is for the courts to decide whether the doctrine has been correctly applied.

The Commissioner here has injected into the 1924 and subsequent Acts by a process of administrative construction the very provisions of the 1921 Act which were omitted from the later Acts. Either the present regulations as sought here to be applied are void as transgressing the powers conferred upon the Commissioner, or else Section 201 (e) of the 1921 Act was wholly superfluous and the decision in the *Bingham* case was founded upon an entire misconception of the 1921 Act.

The Commissioner may not legislate under the guise of administrative regulations.

ARGUMENT.

I.

THE DIVIDENDS OF $266,490.10 AND $48,984.00 WERE RECEIVED ON JANUARY 2, 1925, AND JANUARY 2, 1930, RESPECTIVELY, WHEN THE DIVIDEND CHECKS ACTUALLY CAME TO HAND. UNDER BOTH THE 1924 AND 1928 REVENUE ACTS, THEY WERE TAXABLE INCOME IN THOSE YEARS RESPECTIVELY AND NOT IN 1924 AND 1929.

There is no question but that the resolutions under which Petitioner received his dividends provided that the dividends were payable on or before December 31st of the years 1924 and 1929. The fact remains, however, that the dividend checks themselves did not come into his possession until 1925 and 1930 respectively. The question then is as to whether these dividends under the circumstances were "received" by petitioner in 1925 and 1930 or in 1924 and 1929 within the meaning of Section 213 (a) of the 1924 Act and Section 42 of the 1928 Act. It is our contention that the Statutes are plain in meaning and free from ambiguity, and that neither case is one for the application of the doctrine of constructive receipt.

Aside from the case of *Commissioner* v. *Bingham*, C. C. A. 6, 35 Fed. (2d) 503, which involved special dividend provisions found only in the 1921 Act, there have been three decisions of the United States Circuit Court of Appeals upon the general question involved — *Commissioner* v. *Adams*, C. C. A. 1, 54 Fed. (2d) 228; *Shearman* v. *Commissioner*, C. C. A. 2, 66 Fed. (2d) 256, and the instant cases. The *Adams* case supports Petitioner's

contentions, whereas the decision below and the decision in the *Shearman* case are opposed.

The applicable Statutes are Section 213 (a) of the Revenue Act of 1924, and Sections 22 and 42 of the 1928 Act.

Section 213 (a) of the Revenue Act of 1924 provides:

> "The term 'gross income' includes gains, profits and income derived from salaries, wages or compensation for personal service * * *; also from interest, rents, dividends, securities * * * or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income from the taxable year in which **received** by the taxpayer, unless under methods of accounting permitted under Subdivision (b) of Section 212[1] any such amounts are to be properly accounted for as of a different period."

Section 22 of the 1928 Act provides:

> "'Gross income' includes gains, profits and income drived from salaries, wages or compensation for personal service * * *; also from interest, rents, dividends, securities * * * or gains or profits on income derived from any source whatever."

Section 42 of the 1928 Act provides:

> "The amount of all items of gross income shall be included in the gross income for the taxable year in which **received** by the taxpayer, unless under methods of accounting permitted under Section 41[2] any such amounts are to be properly accounted for as of a different period."

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1. Subdivision (b) of Section 212 provides:
"The net income shall be computed upon the basis of taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income * * *".

2. Section 41 of the 1928 Act is identical with Section 212 (b) of the 1924 Act.

Both the 1924 and 1928 Acts require that the income be *received.*[1]

Apart from accrual accounting, our income tax laws have consistently taxed income upon the basis of receipt. This was likewise the case of the Corporation Tax Law of 1909. The Act of October 3, 1913, used the words "arising or accruing" (38 Statute L 106 in Sec. A, Subn. 1), but these words were construed as equivalent to "received". *Maryland Casualty Company* v. *U. S.*, 251 U. S. 342.

The Revenue Act of 1921 provided special treatment for dividends. Section 213 (a) of that Act defined gross income substantially as in the equivalent sections of the later Acts and provided for reporting income for the taxable year in which received "(except as provided in Subdivision (e) of Section 201)".

Said Section 201 (e) provided:

> "For the purpose of this Act, a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands."

Neither the 1924 nor any of the later Acts contains any provision equivalent to the section last mentioned.

There is no case in this Court involving the precise question, although this Court has said with reference to some of the earlier Acts that the date of payment of a dividend is the date of its receipt as distinguished from the date the dividend is declared. *Mason* v. *Routzahn*,

1. The 1924 and all subsequent Revenue Acts recognizes accrual accounting. Under such a system, receipt is not the controlling factor. Petitioner here is upon the cash receipts and disbursements basis. He is not, therefore, subject to tax upon any theory of accrual. The subject of accrual accounting is discussed in *U. S.* v. *Anderson*, 269 U. S. 422.

275 U. S. 175. Also in speaking generally, this Court has said with reference to some of the earlier Acts that net income was determined "by deducting from gross income received, interest, expenses and taxes actually paid and losses actually sustained". *United States* v. *Anderson*, 269 U. S. 422 at page 438. We submit that the use of the word actually suggests the thought that the imposition of income taxes upon a taxpayer reporting income upon a cash receipts and disbursement basis is rested upon actualities of receipt and disbursement and not upon fiction.

The question is prompted as to when these dividends were "paid" by the corporation and when they were "received" by the taxpayer. Certainly at first blush it would seem that neither a dividend nor any debt is paid by the corporation or debtor, as the case may be, nor is it received by the shareholder or creditor until the money owed actually comes to hand or at least the shareholder or creditor acquires actual possession of whatever medium of payment is adopted by the corporation or debtor, and even then there is no payment or receipt except upon the assumption that the medium of payment such as the dividend check is honored in due course. In other words, a dividend is not technically paid merely by the sending out from the corporation offices of a check for the amount of the dividend. On the other hand, when that check actually comes into the possession of the shareholder, the dividend, we submit, may be regarded as received conditioned obviously upon the subsequent honoring of the check.

The Court below (R. 88-89) refers to the regulations issued under the 1924 Act as dealing with the subject of constructive receipt of dividends but concludes as follows:

"We conclude that the weight of the argument is

> in favor of the conclusion that a stockholder of a corporation which has declared a dividend payable before a certain date, is on said date entitled to the sum thus declared as a dividend. His right thereto is traceable to the corporate action declaring the dividend, not to the check. The latter merely evidences the liability. It does not create the liability. The date the liability attaches, rather than the date of the check which evidences the liability, governs."

That a shareholder upon the payable date of the dividend is entitled thereto is, of course, obvious. This is because the declaration of a dividend creates a debt from the corporation to the shareholder and when the day arrives for payment the debt, like any other debt, is due and if not paid may be recovered by the shareholder in any appropriate action. And we quite agree with the Court below that the shareholder's right is traceable to the corporate action declaring the dividend and not to the check. Obviously, the shareholder's right to the dividend arises from the fact that the dividend has been declared. We have never contended that the shareholder's right to the dividend is traceable to the dividend check. We disagree, however, with the court below in the statement that the check "evidences the liability". The check has nothing to do with the liability beyond the fact that it is the means adopted by the corporation for payment. We therefore agree with the court that the check does not create the liability.

The essence of the decision of the Court below, however, is found in the last sentence of the opinion, wherein it is said: "the date the liability attaches, rather than the date of the check which evidences the liability, governs." In other words, dividends are to be regarded as received by the shareholder on the day they are due and payable without any further action of any kind by any of the parties. Under the view thus expressed, the

dividend checks might be sent out in the year following and still the shareholder is to be regarded as having received the dividends in the preceding year. Neither the Board nor any other Court has carried the doctrine of receipt to any such extent. Even under the 1921 Act, there must be some requisite showing either by the mailing of the dividend check or otherwise that the cash was available to the shareholder, and even under the Commissioner's view under the 1924 and subsequent Acts, the mailing of the check is requisite before the dividend is to be regarded as having been constructively received.

The fact that a dividend or other debt constituting income is due and payable on December 31st of a given year and the corporation or debtor sees fit to deposit in the mails on that day a check for the payment of such dividend or debt does not constitute a receipt of the check or of the dividend or of the debt upon December 31st or at any other time until at least the check comes into the actual possession of the shareholder or creditor.

Obviously many things could intervene to the detriment of the shareholder or creditor. If the check were lost in transit, certainly the corporation or debtor would not have discharged its or his liability as against the shareholder or creditor. Were the corporation or debtor to become insolvent in the interim, certainly the claim of the shareholder (to the extent it would be enforceable at all) or of the creditor would not have been destroyed.

The 1924 Act and all of the subsequent Acts create but one rule with respect to all kinds of income. There is no special treatment given to dividends as distinguished from interest or rent or other gains or profit. All income *must,* not may, be included in the taxpayer's income for the taxable period when received. In *Park* v. *Gilligan,* 293 Fed. 129, it was said:

"It is well settled that the declaration of a divi-

> dend creates a debt from the corporation to its stockholders. If the amount of the dividend be segregated and set apart from the other corporate assets, in money or securities or other property, then the same becomes a trust fund, for the benefit of the shareholders respectively. But that does not seem to have been done in this case. Therefore the crediting of the pro rata shares of the plaintiffs, G. F. Park and Susan F. Park, of this amount to their respective accounts upon the books of the company merely evidenced the indebtedness of the company to them and did not constitute the receipt of income by them. Income means actual cash or its equivalent received, as opposed to contemplated revenue due or unpaid."

The generality of language in the next to the last sentence above quoted may be questioned in the light of those cases where under certain circumstances the doctrine of constructive receipt is applied to dividends, interest, salaries, etc., credited upon the company's books with the unrestricted right of the taxpayer to draw thereon at any time. Yet the underlying conception of the court as to income received cannot, we submit, be successfully challenged. In *Mutual Benefit Life Ins. Co.* v. *Herold,* 198 Fed. 199, involving the Corporation Tax Act of 1929, the court said with reference to the meaning of the word "received" (pp. 214-5):

> "This language seems clearly to indicate that the net income, which is the measure of taxation, means what has actually been received, and not that which, although due, has not been received but its payment for some reason deferred or postponed. * * *
>
> Since, then, the language of the act is explicit in permitting only such deductions from the gross income as were actually paid during the current year, it would be strange, indeed, if on the opposite side of the account the company were charged with what it had not received during the current year. No reason appears or has been suggested for so radical and unwarranted a departure. Furthermore, the word 'income' means, as already shown, that which has

> come in, and not that which might have come in, but did not. If expenditures means what has been paid out, or outgoes, then income means what has come in, or receipts."

In *United States* v. *Schillinger,* 14 Blatch. 71, Cases No. 16228, cited in the *Herold* case, it was said:

> "That in the absence of any special provision of law to the contrary, income must be taken to mean money, and not the expectation of receiving it, or the right to receive it, at a future time."

That the Congress may, as it did in the 1921 Act, declare a special rule as to dividends in determining the taxable period with respect to which they are taxable may be assumed for the purposes of the present discussion. Such a special rule was sustained in *Commissioner* v. *Bingham,* C. C. A. 6, 35 Fed. (2d) 503. But the court there was careful to point out, as will appear later on, that under the 1921 Act, the time when the dividend was received was not controlling provided only that the dividend was in fact at some time received. The 1921 Act made as the determining factor the time when the cash or other property was made available to the shareholder. And the Sixth Circuit held that the mailing out of the dividend check was relevant only as evidence that, at the time of mailing, the cash for payment of the dividend was available to the shareholder.

The special rule of the 1921 Act, however, is not the rule applicable to dividends or to any type of income under the 1924 and subsequent Acts.

Emphasis will be laid, we assume, upon what is called the Legislative History of the 1924 Act with respect to the omission of the provision found in Section 201 (e) of the 1921 Act, and the asserted relation thereof to the doctrine of constructive receipt found in the regulations under the 1924 and subsequent Acts as applied to cor-

porate dividends and especially as sought to be applied in the instant cases.[1]

The legislative history, so-called, consists of certain statements made in Committee reports relating to the 1924 Act.

They show that the 1924 Act when first introduced in the House and Senate had added a provision to Section 213 (a) declaring that all items of income should be considered to be received in the taxable year in which they were unqualifiedly made subject to the demands of the taxpayer, and that the provision appearing in Section 201 (e) of the 1921 Act was wholly omitted. The reports further indicate that in conference the proposed addition to Section 213 (a) was dropped and it was said that the provision stated the rule which was and should be followed in such cases even without the inclusion of the provision in the statute and that the provision had been intended to require "dividends, bond interest, and salaries, such as drawing accounts, to be included in income" when subject to demand by the taxpayer even though not actually received in cash by him. It may be that the various committee members thought that the proposed new matter in Section 213 (a), as well as Section 201 (e) of the 1921 Act, dealt entirely with the doctrine of constructive receipt. But upon that theory, had the proposed new matter been retained, Section 213 (a) would have been reduced to an absurdity as requiring first, that all items of income should be reported as income when "received" and then, second, that all such items of income should be reported as income when "constructively" received. Obviously if that was the meaning of the new matter, it was properly omitted.

1. *Shearman* v. *Commissioner*, C. C. A. 2, 66 Fed. (2d) 256, went off upon the proposition that the enactment of the 1926 and later Acts was an adoption of the regulations issued under the 1924 Act.

The doctrine of constructive receipt is not found in the statute but rests upon administrative practice. Are we to understand that had Section 201 (e) of the 1921 Act not been enacted, the Government would claim that dividends could not be taxed if constructively received only? Or that, that section having been enacted, it was meaningless and nugatory? In the absence of statutory provision, there is no such inherent difference between dividends and other items of income which requires difference of treatment from the standpoint of constructive receipt. It is a mistake, therefore, to permit the issue to be clouded by viewing Section 201 (e) of the 1921 Act as dealing with dividends merely from the standpoint of the doctrine of constructive receipt. If that section was intended for no other purpose than to subject dividends to tax if constructively received, the section was not only superfluous but under established principles of statutory construction all other items of income might properly be regarded as exempt from tax under any theory of constructive receipt. *Expressio unious est exclusio ulterius.* We do not think that any such intention should be attributed to the Congress in the enactment of the 1921 Act.[1] In view, how-

1. That dividends may be constructively received wholly apart from a provision like that in Section 201 (e) of the 1921 Act is apparent from *Hadley* v. *Commissioner*, App. D. C., 36 Fed. (2d) 543; *Brooks* v. *Commissioner*, C. C. A. 4, 35 Fed. (2d) 178; both involving statutes prior to the 1921 statute. In our above statement, we have in mind certain Committee reports made to the 67th Congress in connection with said Section 201 (e) of the 1921 Act. Reference to these reports appears in the opinions of the Board in *Robert W. Bingham*, 8 B. T. A. 603, beginning at page 605. Section 201 (e) of the 1921 Act if intended to deal with constructive receipt is not only awkwardly but inaccurately worded. The section must be taken as it stands and cannot be regarded as dealing with constructive receipt. Cf. *Commissioner* v. *Bingham*, C. C. A. 6, 35 Fed. (2d) 503. It appears from the majority opinion of the Board in the *Bingham* case that the Government was then contending that under the 1921 Act dividends were taxable in the year in which they were payable (8 B. T. A. p. 606). But obviously income is not "received" either actually or constructively merely because due and payable. In accrual accounting, the dividend probably accrues when declared without reference to when it is payable. Cf. *United States* v. *Anderson*, 269 U. S. 422.

ever, of the importance placed upon the matter by the Government and its effect upon the Second Circuit in the *Shearman* case, we deem it advisable to draw the court's attention to the state of the prior law.

The 1918 Act in Section 213 (a) required all items of gross income to be reported "for the taxable year in which received by the taxpayer". Section 201 (a) defined the term dividend as any distribution "made" by a corporation whether in cash or in other property or in stock of the corporation out of its earnings or profits accumulated since February 28, 1913. Subdivision (b) of Section 201, provided that any distribution should be deemed to have been made from earnings or profits, unless all earnings and profits should first have been distributed, and that any distribution made in the year 1918 or in any subsequent year should be deemed to have been made from earnings or profits accumulated since February 28, 1913. Subdivision (c) of Section 201, declared that a dividend paid in stock of the corporation should be considered income to the amount of the earnings or profits distributed. Subdivision (d) of Section 201, provided that a stock dividend received by a taxpayer between January 1 and November 1, 1918, both inclusive, or bona fide authorized or declared and entered on the books of the corporation during such period and received by a taxpayer after November 1, 1918, and prior to the expiration of thirty days after the passage of the Act, should be taxed at the rate prescribed by law for the years in which the corporation accumulated the earnings or profits from which the dividend was paid, and that the dividend be deemed to have been paid from the most recently accumulated earnings or profits. Subdivision (e) of Section 201, made further provision as to the earnings or profits under which any distribution should be deemed to have been made. As distinguished from stock

dividends, cash dividends were not subjected to different rates depending upon the time when the earnings or profits were accumulated out of which the dividends were paid. However, under the Excess Profits Tax Law, the question as to the earnings or profits out of which the dividend was paid was of large importance because of the question of invested capital which was involved.

The Statute, as we have said, defined dividends as any distribution "made" by a corporation. The Commissioner took the view that a distribution "made" meant a dividend "paid" as distinguished from declared, and also that the word "paid" meant paid or accrued depending upon the particular method of accounting used by the taxpayer. Article 23, Reg. 45 (1918).

Article 1541 (Reg. 45) provided that "the mere declaration of the dividend is not a distribution", followed by the statement that "dividends are income and are taxed at the rates for the year in which paid regardless of when the earnings or profits out of which they are paid were accumulated". Article 54 (Reg. 45) provided that "dividends on corporate stock are subject to tax when set apart for the stockholders although not yet collected by them".[1]

1. Section 31 (b) added to the 1916 Act by the Revenue Act of 1917 provided that any distribution "made" to the shareholders in the year 1917 or subsequent years should constitute a part of the annual income of the distributee "for the year in which received", and that it should be deemed to have been made from the most recently accumulated undivided profit or surplus, and should be taxed at the rates prescribed by law for the years in which the profits were accumulated. Some of the lower courts had held that a distribution was "made" when the dividend was declared and that the date of payment was immaterial (*Plant* v. *Walsh*, 280 Fed. 722; *Mason* v. *Routzahn*, 8 Fed. (2d) 56; *Philips* v. *U. S.*, 12 Fed. (2d) 598). *Mason* v. *Routzahn*, *supra*, was subsequently reversed by the Sixth Circuit Court of Appeals (13 Fed. (2d) 702), but was affirmed by this court. The Sixth Circuit, however, held that the word "made" meant payment and not a mere declaration of the dividend. This court approved that holding saying: "It (the Statute) declared that the dividend is income of the shareholders in the year in which it is 'received'. We think it clear that for this purpose the date of payment not the date of the declaration of the dividend is the date of distribution." (*Mason* v. *Routzahn*, 275 U. S. 175.)

The above is therefore the administrative practice which, as we understand it, is claimed to have been adopted by the enactment of Section 201 (e) of the 1921 Act. We submit that the claim will not stand analysis.

Section 201 (e) of the 1921 Act did not follow the language of Article 54 of Regulations 45. It provided, as we have said:

> "For the purpose of this Act, a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands."

and Section 213 (a) expressly excepted dividends from the criterion of receipt as determining the accounting period with respect to which they were subject to tax.

Bingham v. Commissioner, 8 B. T. A. 603, arose under the 1921 Act and was decided by the Board of Tax Appeals in 1927. The doubt and confusion on the question starts with that case, and results, we submit, from the failure to appreciate the significance and effect of Section 201 (e) of the 1921 Act. In that case Bingham received a number of dividend checks on January 2, 1923. The checks were drawn on December 30th and 31st, 1922, in payment of dividends declared during 1922 and payable on or about December 31st of that year. The checks were mailed from the various corporation offices on December 30th and 31st, 1922. The Board by a bare majority, and in spite of Section 201 (e), held that the dividends were taxable in 1923, the year in which the dividend checks were actually received. Seven members of the Board dissented. It was said in one of the dissenting opinions (p. 610) that the majority construction rendered Section 201 (e) entirely superfluous and that without it, "a taxpayer recipient of corporate dividends would report

it by that decision exactly as he reports all other income". It was further said with reference to the express exception of dividends from Section 213 (a) that it "is a clean, clearcut declaration on the part of Congress that it did not intend that corporate dividend income should be absolutely controlled, in reporting same, by the taxpayer's accounting method. All other income may be so reported, but dividends are expressly excepted from such control". (pp. 610-611.) In the dissenting opinion of Mr. Phillips, it was said "that the provisions of the Act do not make dividends taxable when declared but only when 'cash or other property in unqualifiedly made subject to their (stockholders') demands'. The language is not equivalent to a declaration that dividends are taxable when declared or even when payable unless, in the latter case, the money or other property to be distributed is available. It would seem that the purpose of the regulation referred to in the Finance Committee report was to require that dividends should be reported in the year in which they became payable, if payment was available."[1]

On appeal to the Sixth Circuit Court of Appeals, the judgment of the Board was reversed. *Commissioner* v. *Bingham*, C. C. A. 6, 35 Fed. (2d) 503. That court gave controlling effect to Section 201 (e) saying:

> "* * * Section 213 (a) as applicable to the respondent's return, he having kept his books upon the receipts and disbursements basis on the calendar year period (Section 212 (b)), provides generally that gross income for tax purposes shall be allocated to the year in which received, but, by specific exception inserted in that section in parenthesis, taxable distributions made by corporations to its shareholders (dividends) are excluded from such provision.

1. This reasoning is to be compared with that of the court below, which was in effect, that under the 1924 and 1928 Acts without the aid of any provision similar to that of Section 201 (e) of the 1921 Act, dividends are taxable in the year when payable, without more. (R. 88-9).

> The reason for such exclusion of course was that an entirely different basis for fixing the tax year for dividends had already been established in Section 201 (e) which section must control. * * *
>
> The important thing is that the shareholder did receive a dividend, *not when or how.* Having received it, the statute (Section 201 (e)) required that it be included in his gross income as of the date, *not when received* but when the cash (for this was a cash dividend) was unqualifiedly made subject to his demand." (Italics ours.)

The Sixth Circuit further pointed out that the only relevancy of the fact of the mailing of the checks was that it was evidence that the cash was then unqualifiedly subject to the stockholder's demand.

Nothing in the opinion of the Sixth Circuit Court of Appeals in the *Bingham* case suggests that the decision rested upon any doctrine of constructive receipt or upon anything other than the express provisions of Section 201 (e). In fact Section 201 (e) does not deal with dividends from the standpoint of either constructive receipt or accrual accounting. It declares a special statutory rule applicable only to dividends and not to any other type of income. By virtue of Section 213 (a) dividends are excepted from the general operation of accrual accounting as well as of the cash receipts and disbursements basis.

Certiorari was denied by this court in the *Bingham* case.

Regulations 62 issued under the 1921 Act in Article 1541 thereof adopted verbatim the statutory language found in Section 201 (e) of the Act. Article 53 adopted substantially the same language though with some change of phraseology.[1]

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1. "Article 53— * * * Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder". It is doubtful if the change in phraseology intended a change in meaning as express reference was made to Section 201 of the Statute and to Article 1541 of the Regulations.

The regulations issued under the 1921 Act obviously can be sustained inasmuch as they merely incorporate the provisions of the Act itself upon the subject. The fact that the regulations are dealt with by the Commissioner under the general theory of constructive receipt is wholly immaterial. The regulations mean whatever the statute means. They are valid because they have the support of the statute, not because, apart from the statute, they constitute proper application of the doctrine of constructive receipt.

The 1921 Revenue Act was repealed and the 1924 and 1926 Acts were both enacted in which the provisions of Section 201 (e) of the 1921 Act were omitted long prior to the decisions of the Board and of the Sixth Circuit Court of Appeals in the *Bingham* case.

Notwithstanding the omission of the provisions of Section 201 (e) of the 1921 Act from the 1924 Act, the Commissioner carried forward into Regulations 65 issued under the 1924 Act the identical provisions with respect to the taxing of dividends as had been included in Regulations 62. Obviously, and in its final analysis, this could only be justified upon the theory that Section 201 (e) of the 1921 Act was wholly surplusage and meaningless—otherwise the Commissioner in Regulations 65 was injecting into the law something not found in the statute and not warranted by it. In other words, the Commissioner was engaging in a process of legislation through the guise of administrative regulation.

Commissioner v. *Adams* was decided by the Board (20 B. T. A. 242) in 1920 and by the First Circuit, 54 Fed. (2d) 228, in December, 1931. The situation there was similar to that in the *Bingham* case excepting that the dividend resolution expressly provided that the dividend checks should be mailed out on December 31st. The case arose under the 1924 Act.

The Board held for the taxpayer on the ground that the dividends were not received until the dividend checks came to hand. The decision was rested upon two grounds —first, that the dividend resolution required the dividend checks to be mailed on December 31st, and the *Bingham* case was therefore distinguishable; and second, because of the omission from the 1924 Act of the provisions found in Section 201 (e) of the 1921 Act. It was said (20 B. T. A. 242, p. 246) that "Congress intended that even under the 1924 Act there might be a constructive receipt of dividends which would make such dividends taxable to the stockholder prior to the date upon which he actually received them"[1] and that, in general, "income should not be construed to have been received prior to the date of actual receipt except where a taxpayer turns his back upon income or does not choose to receive income which he could have if he chose".

Upon appeal, the Board's decision in the *Adams* case was affirmed. *Commissioner* v. *Adams*, C. C. A. 1, 54 Fed. (2d) 228. The Court there said (p. 229):

> "The case of *Commissioner* v. *Bingham, supra*, is clearly distinguishable from the present one, for the reason that the tax there in question was governed by the Revenue Act of 1921, in which section 201 (e) expressly provides that dividends 'shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands,' which provision the Revenue Act of 1924 does not contain.
>
> The act of 1924 not only does not contain the above provision, but in section 213 (a) expressly provides that dividends 'shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212,' with which exception we are not concerned.

1. We have pointed out that dividends may be constructively received wholly apart from a provision like that in Section 201 (e) of the 1921 Act. Note 1, *supra*, p. 20.

> The applicable provisions of section 213 (a) are not ambiguous; the langauge used clearly expresses the intention of Congress. Its intention, where the language of the act is unambiguous and its meaning plain, is to be gathered from the acts itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this act speaks for itself; it does not call for construction. And on this ground alone, we think that the Board of Tax Appeals did not err in reaching the conclusion that it did."

In 1931 after the decision of the Board in the *Adams* case and prior to its affirmance by the First Circuit Court of Appeals, the Board decided the case of *Mary Miller Braxton*, 22 B. T. A. 128, which arose under the Revenue Act of 1926. That case is discussed in the Board's opinion in the two instant cases (R. 31). There again the Board divided. In the majority opinion, the *Adams* case was distinguished because of the special provision in the dividend resolution as to the mailing of the checks, nothing being said as to that part of the opinion in the *Adams* case dealing with the change made in the 1924 Act itself with respect to dividends. One member of the Board specially concurred, but upon the ground that there was no distinction between the *Adams* case and the *Braxton* case, and that the *Adams* case was in conflict with the decision of the Sixth Circuit in the *Bingham* case. Three members of the Board dissented without opinion. One member dissented, it was said, for the reasons set forth in the *Bingham* case and because the *Adams* case was distinguishable. The *Braxton* case was not appealed.

Subsequent to the decision of the First Circuit Court of Appeals in the *Adams* case, the Board decided *Effie B. Shearman*, 26 B. T. A. 716, under the 1928 Act. There the dividends were declared in 1928 and were payable on December 31, 1928, to stockholders of record "at the

close of business on that day". Checks dated December 31, 1928, were mailed on that date to the stockholders and were received by Mrs. Shearman on January 2, 1929. Following its decision in the *Braxton* case, the Board held the dividends taxable in 1928.

The Board seemed to regard the decision of the First Circuit Court of Appeals in the *Adams* case as limited entirely to the special provision in the dividend resolution, wholly ignoring what the court had said with reference to the effect of the omission from the 1924 Act of the special provisions of Section 201 (e) of the 1921 Act.

The *Braxton* case was followed by *Franklin J. Matchette,* 26 B. T. A. 909 (1924 Act). The *Braxton* and *Shearman* cases were held controlling. The *Matchette* case was not appealed.

Shearman v. *Commissioner,* CCA (2), 66 Fed. (2d) 256, affirming the Board, seems to accept the regulations as a correct exposition of the doctrine of constructive receipt as applied to dividends. This we challenge. The real question seems to us to be, whether apart from matters of nomenclature, dividends can be said to be actually or constructively received under the circumstances presented.

II.

THE DOCTRINE OF CONSTRUCTIVE RECEIPT IS NOT APPLICABLE.

We have set out in the Appendix the relevant provisions of the various Regulations issued under the various Acts upon the subject of constructive receipt. That doctrine is an administrative concept of the statutory word "received." But, as has been said by the Board (*Re Cowell,* 18 B. T. A. 997, 1001),

> "Unless it is kept within the penumbra of actual receipt, it will invade the field of accrual accounting, and this should not be permitted."

The case of *Re Brander,* 3 B. T. A. 231, is perhaps the leading Board case upon the subject. It was there said:

> "* * * This doctrine, as we have made clear in several appeals, is not to be applied lightly, but only in situations where it is clearly justifiable. When taxable income is consistently computed by a citizen on the basis of actual receipts, a method which the law expressly gives him the right to use, he is not to be defeated in his bona fide selection of this method by 'construing' that to be received of which in truth he has not had the use and enjoyment. Constructive receipt is an artificial concept which must be sparingly applied, lest it becomes a means for taxing something other than income and thus violating the Constitution itself.
>
> "Doubtless, however, there are clear cases of constructive receipt, such, for example, as that of the bond owner who chooses not to cash his coupon but to permit it to remain uncut in the possession of another. He will not be heard to say that the amount of the coupon is not his income because he did not in fact receive it. The receipt is entirely within his own control and disposition."

Upon occasions, as we have pointed out, dividends have been made the subject of the application of the

doctrine of constructive receipt, under circumstances warranting the application of that doctrine. *Hadley* v. *Commissioner,* App. D. C., 36 Fed. (2d) 543; *Brooks* v. *Commissioner,* C. C. A. 4, 35 Fed. (2nd) 178.

In those cases the dividends were actually credited to the stockholder's account upon the corporate books, along with salaries, rents, interest and other items due from the company, and the taxpayer had the right to draw and did draw indiscriminately against the amount standing in the account to his credit. It would seem apparent that under such circumstances the taxpayer had "received" the dividends for tax purposes.

In the case of the bond interest coupon maturing in a given year, the taxpayer has received during that year, and is in actual possession of, the symbol of the debt, namely, the coupon itself, in which case it may properly be regarded that the income or interest represented by the coupon has been "constructively" received as of the due date of the coupon. Such a case, however, is distinguishable from an ordinary case of interest merely accruing upon a debt which is unpaid. In the latter situation, such interest is not "received" merely because it is past due.

The essence of the doctrine of constructive receipt is that the fund is in fact within the control of the taxpayer and the failure to reduce the fund to actual possession is due to the taxpayer's own voluntary act or conduct. In other words "income should not be construed to have been received prior to the date of actual receipt except where a taxpayer turns his back upon income or does not choose to receive income which he could have if he chose." *Cecil Q. Adams,* 20 B. T. A. 243, 246.

A debt owing is obviously not of itself income received.

Payment is requisite. It is not competent, we submit, for the Commissioner, without statutory authority, to say that it is.

We think our position is supported by the general provisions of the regulations issued by the Commissioner other than as they specifically deal with the question of constructive receipt of dividends; and excepting those cases involving the 1921 Act. Art. 53, Reg. 45 (1918); Art. 52, Reg. 62 (1921); Art. 51, Reg. 65 (1924); Art. 51, Reg. 69 (1926); Art. 332, Reg. 74 (1928); Art. 332, Reg. 77 (1932).

It may be said by the government that the Petitioner's argument does not admit of the doctrine of constructive receipt under the 1924 and 1928 Acts. This claim is not sound. The doctrine of constructive receipt, whether with respect to dividends or any other species of income, is quite applicable under the 1924 and subsequent acts, wherever the circumstances are such as make the application of that doctrine proper. The cases heretofore referred to under some of the earlier acts in which the doctrine of constructive receipt has been applied to dividends is a sufficient answer to the government's claim. The Commissioner is endeavoring to single out dividends from all other species of income and subject them alone to special treatment under the guise of constructive receipt, something which can only be done by statute as in the case of the 1921 Act. We should like to know whether the government regards Sec. 201(e) of the 1921 Act as surplusage and whether it considers that the regulations issued under that act with reference to dividends would be valid, had Sec. 201(e) been omitted.

It is not necessary, we believe, that the Court determine any abstract question as to whether the wording of the Regulations under the 1924 and 1928 acts is or is not

faulty. The issue is not as to phraseology but is as to whether the dividends here involved were "constructively" received by petitioner at the times claimed by the Commissioner. We say that the issue is as to whether the dividends were constructively received for the reason that there is no claim that the dividends were *actually* received except as of the time when the dividend checks came to hand. If the same criterion as to constructive receipt holds in the case of dividends as holds in the case of other items of income, there was no constructive receipt by petitioner of the dividends here involved. Only upon such theory as is found in the 1921 Act can the Commissioner's claim be sustained.[1]

We venture to say that had Section 201 (e) been omitted from the 1921 act, no question would ever have arisen as to the correctness of the holding of the Board in the *Bingham* case to the effect that dividends are not income received in a given year merely because they are payable in that year and dividend checks are mailed out on December 31.

In considering the alleged administrative practice prior to 1921, the fact remains that in cases other than dividends, the Commissioner never claimed that the fact

1. The instances of constructive receipt referred to in this brief are by no means intended as all-inclusive. The bond coupon is the simplest illustration of constructive receipt. The taxpayer has in his possession the symbol of the debt. Even there, however, the rule is not arbitrary and will yield to the fact (*Re Southern Pacific Co. et al.* 21 B. T. A. 990). Payments made to a third party for or on account of the taxpayer are also illustrations of constructive receipt (*Re Strauss*, 2 B. T. A. 598; *Re Voyer*, 4 B. T. A. 1192; cf. *Black* v. *Bolen* (D. C.) 268 F. 42[illegible] I. T. 1846, C. B. II-2, p. 210; Art 70, Reg. 77 (1932)). The crediting of salaries and dividends and the like to the taxpayer's account upon the company books upon which the taxpayer is free to draw whenever he sees fit to do so is but one illustration of the rule. Questions of estoppel sometimes prevent the application of the doctrine. (*Re Moran*, 26 B. T. A. ..... Dec. #7761). Funds which are the subject matter of litigation are not income received (*Kales* v. *Woodworth* (D. C.) 20 F. (2d) 395; *Dodge* v. *United States*, 64 Ct. Cl. 178; *North American Oil Consolidated* v. *Burnett*, 286 U. S. 417, 423). The fiction must give way to the fact.

that income was due and payable and that checks in payment thereof had been mailed out constituted income received by the recipient. The holdings of the Board are to the contrary and the Commissioner has acquiesced therein. *Re Edmunds,* 1 B. T. A. 998; *Re Cremin,* 5 B. T. A. 1164; *Re Titus,* 2 B. T. A. 754.

In the *Edmunds* case, the corporation authorized the payment of additional compensation to the taxpayer. On December 31 the corporation issued its check in the required amount payable to the taxpayer and charged the same to him upon its books. It appeared that upon the day the check was issued, the corporation was amply able to make the payment and had ample funds in the bank for the payment of the check when presented. The Commissioner claimed that the amount represented by the check was taxable for the year in which the check issued. The Board reversed the Commissioner on the ground that the additional compensation was not received by the taxpayer until the following year when the check therefor came into his possession. The Commissioner acquiesced in this holding (C. B. IV-1, p. 2). The same holding was made in the *Cremin* case and the Commissioner again acquiesced. (C. B. VII-1, p. 8).

While it is true that the *Edmunds* case was decided in 1925 and the *Cremin* case in 1927, we cannot believe that the Commissioner would have acquiesced therein had the well established departmental practice prior thereto been as the Government now seem to claim. In the *Titus* case, a client sent a check to his attorney for services which had been billed in 1917 but which check was not actually received until 1918. The Board held upon the authority of the *Edmunds* case that the amount so paid was income for 1918. In that case the taxpayer was claiming a constructive receipt in 1917, which claim was over-

ruled. The Commissioner again acquiesced. (C. B. VII-1, p. 31).

In the instant cases the practice of the corporation was such as to preclude the receipt by any of its shareholders of the dividends until 1925 and 1929. (R. 20-22.) While we do not believe the cases should be disposed of on this narrow ground, yet if the *Adams* case is sustainable only because of its special features then, we submit, the instant cases are governed by a like rule. The effect of the practice was the same as the provision in the *Adams* case resolution for mailing the checks. However, the broad ground of the decision in the *Adams* case is the one for which we contend.

III.

THE COMMISSIONER MAY NOT BY ADMINISTRATIVE REGULATIONS CHANGE OR ENLARGE THE CLEAR MEANING OF THE STATUTE. THE REGULATIONS AS SOUGHT TO BE APPLIED TO THE INSTANT CASES ARE VOID.

The applicable statutes state explicitly that all items of income are to be included in the taxable period in which *received* by the taxpayer. The 1921 Act made a special rule as to dividends. That special rule in the 1921 statute was carried into the regulations issued under that statute verbatim. (Arts. 53, 1541; Reg. 62; App. pp. 29-30). Notwithstanding the omission of these special provisions in the 1924 and subsequent acts, the regulations issued in this respect under the 1921 Act were carried forward into the regulations under the later Acts without material change. Obviously, if the 1924 and subsequent acts materially changed the law as to reporting dividends from what it was under the 1921 Act, the regulations under the 1924 and subsequent acts to the extent as here applied, are in direct violation thereof, and are,

therefore void. While administrative construction of a statute may be looked to in order to resolve an ambiguity resort to such construction will not be permitted to create one. (*R. R. Commission* v. *C. B. & Q. R. Co.*, 257 U. S. 363). Where a statute is free from ambiguity then administrative construction thereof is immaterial, (*Swift, etc. Co.* v. *U. S.*, 105 U. S. 691; *Iselin* v. *U. S.*, 270 U. S. 245), no matter of how long standing such administrative construction may have been. (*U. S.* v. *Graham*, 110 U. S. 219; *U. S.* v. *Johnson*, 173 U. S. 363).

It may be that certain decisions of this court will be referred to as authority to the proposition that the reenactment of Section 213 (a) of the 1924 Act in 1926 and thereafter is a legislative approval of the regulation thereunder. cf. *Shearman* v. *Commissioner*, C. C. 2, 66 Fed. (2d) 256.

In *Brewster* v. *Gage*, 280 U. S. 327, the question was as to when the taxpayer had "acquired" certain property which he had received as residuary legatee. In other words, was the time of acquisition the date of the death of the decedent or the date of the actual distribution? As to personal property, the term is ambiguous. The regulations under earlier Acts had uniformly construed the statute to refer to the death of the decedent. This court held that there being an ambiguity in the statute, the practical interpretation of the Commissioner would not be disturbed, and that the substantial re-enactment in later Acts of the earlier statutory provisions was a legislative approval of the administrative construction.

Burnett v. *Thompson Oil and Gas Company*, 283 U. S. 301, involved the question as to the amount of depletion that could be taken in the case of oil properties under the 1918 Act. The statute provided for a reasonable allow-

ance for depletion to be in accord with rules and regulations to be prescribed by the Commissioner. This Court pointed out that the statute merely provided for a reasonable allowance and left it to the Commissioner to make the necessary regulations therefor. It was held that the re-enactment in later statutes of the same provision was persuasive that Congress approved the regulations which the Commissioner had prescribed.

In *Murphy Oil Company* v. *Burnett*, 287 U. S. 299, the question was whether bonus payments upon an oil lease were depletable under the 1918 act. The Regulations required such depletion. The Court held that the subsequent re-enactment of the depletion provisions of the 1918 act was an approval of the Regulations. As in the *Thompson Oil & Gas Company* case, *supra*, the statute provided for a reasonable allowance and left it to the Commissioner to prescribe the same by his rules and regulations.

Burnett v. *Brooks*, 288 U. S. 378, involved the question as to the right of Congress to tax certain intangible property belonging to an alien. The property consisted of bonds and stocks, etc., all of which were physically present in the United States. The Court reviewed the legislation upon the subject and earlier decisions of the Court and held that as a matter of construction, Congress intended to subject such property to tax, leaving the sole question remaining for decision as to whether Congress had the power to impose the tax. It appeared that administrative practice under similar conditions had been to subject such bonds to tax. It was accordingly said that the court would not question the intention of Congress, when the 1924 Act was enacted, that said property should be taxed; citing *Brewster* v. *Gage*, *supra*.

In *United States* v. *Dakota-Montana Oil Company*, 288 U. S. 459, a taxpayer claimed a deduction in its tax rate

for 1926 on account of a depletion allowance on account of the capitalized cost of preliminary development and drilling. The Commissioner refused the deduction, ruling that it was for depletion and not depreciation and was therefore included in the present statutory depletion allowance of 27½ per cent of gross income which the taxpayer had also deducted. The 1926 Act provided for depletion and for depreciation of improvements to be made under rules and regulations to be prescribed by the Commissioner. The Court reviewed the earlier Acts and the regulations thereunder and finally held that the re-enactment of these statutory provisions carried with it the prior administrative construction.

In *Massachusetts Mutual Life Insurance Company* v. *U. S.*, 288 U. S. 269, the insurance company attempted to report its income in part upon the cash receipts and disbursements basis and in part upon an accrual basis. The administrative construction had been to require all insurance companies to report upon the cash receipts basis. It was held that the re-enactment in the 1928 and 1932 Acts of the early provisions was an approval of the administrative construction of the earlier statutes.

Some of the above cases involve a statute which merely fixes a general standard leaving it to the Commissioner to apply the standard to specific cases. Cases like *Brewster* v. *Gage*, *supra*, are also different. The regulations here do not attempt so much a construction of the word "received," as an attempt to create a special rule as to dividends not applicable to other species of income. Whatever may be the power of the Commissioner to tax income upon the theory of constructive receipt, we contend that it is for the court in the final analysis to determine whether the doctrine of constructive receipt has been properly applied and that the

Commissioner has no right to single out dividends and subject them to special treatment upon some supposed theory of constructive receipt which is not applicable to all income alike. The 1924 and all subsequent Acts treat dividends and all other items of income in the same manner. It is not for the Commissioner to declare a different policy in that regard.

Where a statute is plain and unambiguous, it speaks for itself and the court will not examine into or consider its legislative history or committee reports thereon or the like. (*Caminetti* v. *U. S.*, 242 U. S. 470; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 320; *Commissioner* v. *Adams*, C. C. A. 1, 54 Fed. (2d) 228).

Conclusion.

The right of a taxpayer to report his income and pay tax thereon upon the cash receipts and disbursements basis has been secured to him by all of our income tax legislation in recent years with the sole exception of the 1921 Act in its special treatment of dividends. No taxpayer keeping his books upon the cash receipts and disbursements basis may be compelled to report his income or pay tax thereon upon the accrual basis or upon any other basis except as the statute directs. Nor is the taxpayer to be penalized by insisting upon exercising the right reserved to him by the law. By a process of administrative legislation, we respectfully submit, the Commissioner has burdened petitioner with an additional tax liability of more than a hundred thousand dollars for the calendar year 1924 and more than twenty-six hundred dollars for the calendar year 1929, although it stands

admitted that this asserted liability is founded not upon the actual receipt of income by petitioner but upon the ground that petitioner "constructively" received such income in those years. The actualities of the case are that the income was received in 1925 and 1930. The fiction indulged in by the Commissioner throws the income into earlier years with the resulting additional and burdensome liability. We doubt if any case can be found involving any species of income other than dividends to which the Commissioner has attempted to apply the doctrine of constructive receipt under the circumstances shown here to exist. The special rule which he has attempted to create as to dividends alone is inconsistent with his rule generally as to other kinds of income. That effort on the part of the Commissioner, we submit, and the holdings of the Board thereon, are the result of a misunderstanding of the legal effect of Section 201 (e) of the 1921 Act and of the decision of the Sixth Circuit in the *Bingham* case.

Whatever may have been the intention when Section 201(e) was put into the 1921 act, we must take it as we find it and give to it that meaning which its language requires. The 1924 and subsequent acts having changed the law in that particular, the taxability of dividends must now be determined upon precisely the same basis as in the case of all other species of income. This is not, however, the effect of the Regulations issued under the 1924 and subsequent acts and to that extent they are ineffective.

We respectfully urge that the judgments of the court below and of the Board be reversed.

Respectfully submitted,

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APPENDIX.

1918 ACT—REGULATIONS 45.

ARTICLE 52. *When included in gross income.*—Gains profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him. See articles 21-24. * * *

ARTICLE 53. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until the termination of five years of employment, the mere crediting on the books of the corporation does not constitute receipt. The distinction between receipt and accrual must be kept in mind. Income may accrue to the taxpayer and yet not be subject to his demand or capable of being drawn on or against by him.

ARTICLE 54. *Examples of constructive receipt.*—Where interest coupons have matured, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. This is so if the coupons are exchanged for other property instead of eventually being cashed. *Dividends on corporate stock are subject to tax when set apart for the stockholder,*

although not yet collected by him. See section 201 of the statute and articles 1541-1549. * * *

ARTICLE 1541. *Dividends.*— * * * *The mere declaration of a dividend is not a distribution. Dividends are income and are taxed at the rates for the year in which paid, regardless of when the earnings or profits out of which they were paid were accumulated.*

1921 ACT—REGULATIONS 62.

ARTICLE 51. *When included in gross income.*—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting following by him. See articles 21-24; as to dividends, see section 201(e) and articles 1541-1549. * * *

ARTICLE 52. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 53. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. This is true if the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid.

Dvidends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder. See section 201 of the statute and articles 1541-1549. * * * Interest credited on savings bank deposits, even though the bank nominally have a rule, seldom or never enforced, that it may require so many days' notice in advance of cashing depositors' checks, is income to the depositor when credited. * * *

ARTICLE 1541. *Dividends.* * * * *A taxable distribution made by a corporation to its stockholders or members shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 53.*

1924 ACT—REGULATIONS 65.

ARTICLE 50. *When included in gross income.*—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him. See articles 21-24. * * *

ARTICLE 51. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualified subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 52. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his

gross income for the year during which the coupons matured. This is true if the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder.* * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice in advance of cashing depositors' checks, is income to the depositor when credited. * * *

ARTICLE 1541. *Dividends.* * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 52.*

1926 ACT—REGULATIONS 69.

ARTICLE 50. *When included in gross income.*—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. See articles 21-24. * * *

ARTICLE 51. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 52. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured. This is true if the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder.* * * * Interest credited on saving bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. * * *

ARTICLE 1541. *Dividends.* * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 52.*

1928 ACT—REGULATIONS 74.

ARTICLE 331. *When included in gross income.*—Gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. See articles 321-323. * * *

ARTICLE 332. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. Where a corporation contin-

gently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 333. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, shall be included in gross income for the year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. The interest shall be included in gross income even though the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder.* * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. * * *

ARTICLE 621. *Dividends.*—* * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 333.*

1932 ACT—REGULATIONS 77.

ARTICLE 331. *When included in gross income.*—Gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. See articles 321-323. * * *

ARTICLE 332. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer

without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

ARTICLE 333. *Examples of constructive receipt.* — When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, shall be included in gross income for the year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. The interest shall be included in gross income even though the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. *Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder.* * * * Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. * * *

ARTICLE 621. *Dividends.* — * * * *A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 333.*

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 791

SEWELL LEE AVERY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 792

SEWELL L. AVERY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON A PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

These cases involve the question whether a dividend paid to a stockholder accounting on the cash receipts and disbursements basis is returnable as part of his gross income in the year in which declared, although the dividend check is not actually received until the following year. The decision below, answering this question in the affirmative, is in accord with the decision of the Circuit Court of

Appeals for the Second Circuit in *Shearman* v. *Commissioner*, 66 F. (2d) 256, and follows the principles laid down by the Circuit Court of Appeals for the Sixth Circuit in *Commissioner* v. *Bingham*, 35 F. (2d) 503, certiorari denied, 281 U.S. 729, as to when a dividend becomes unqualifiedly subject to the demand of the stockholder. It appears, however, to be in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Adams*, 54 F. (2d) 228. The only difference between the instant case and the *Adams* case that might be considered material is that the resolution declaring the dividend in the *Adams* case contained the words "checks for the same to be mailed December 31, 1924." The court in that case, however, based its decision largely on the theory that the dividend would not in any event have been returnable until the check was actually received.

The same question arises in a number of cases under all the Revenue Acts from 1924 on, and until the conflict of decisions is resolved there will be substantial difficulties in the administration of the law. For these reasons, although we consider the decision below to be correct, we do not oppose the granting of the writ.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

FILE COPY

Nos. 791 and 792

In the Supreme Court of the United States

OCTOBER TERM, 1939

SEWELL LEE AVERY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

SEWELL L. AVERY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23, 52) is a memorandum opinion and therefore not officially reported. The opinion of the Circuit Court of Appeals (R. 87) is reported in 67 F. (2d) 310.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 26, 1933. (R. 89, 99.) A petition for rehearing was denied November 21, 1933. (R. 90, 100.) The petition for certiorari was filed February 16, 1934, and granted March 19, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The taxpayer, who kept his accounts and reported his income on a cash receipts and disbursements basis, owned stock in a corporation which in the preceding November declared dividends payable on or before December 31, but did not receive checks issued in December for the dividends until January 2, following. The questions are:

1. Whether the provisions of the applicable Treasury Regulations relating to the time when dividends are to be returned as income are authorized and valid.

2. Whether, under the circumstances of this case, the dividends were unqualifiedly made subject to the taxpayer's demand in the earlier year under the terms of the applicable Treasury Regulations and constitute income for that year.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, p. 17.

STATEMENT

The facts as found by the Board of Tax Appeals may be summarized as follows (R. 23–28, 52–57):

The taxpayer, a resident of Evanston, Illinois, who reported his income upon a cash receipts and disbursements basis, owned certain shares of stock of the United States Gypsum Company, of which he was president. In November 1924 a resolution was duly adopted by the Gypsum Company declaring certain dividends to be paid "on or before December 31, 1924." (R. 24–25.) On January 2, 1925, the taxpayer received a check for these dividends, in the amount of $266,490.10. (R. 26.) In November 1928 a resolution was duly adopted by the Gypsum Company declaring certain dividends to be paid "on or before December 31, 1928." (R. 25.) On January 2, 1929, the taxpayer received a check for these dividends in the amount of $32,656. (R. 26.) In November 1929 a resolution was duly adopted by the Gypsum Company declaring certain dividends to be paid "on or before December 31, 1929." (R. 25–26.) On January 2, 1930, the taxpayer received a check for these dividends in the amount of $48,984. (R. 26.)

In each case the dividend checks were prepared, signed by the proper officers of the corporation, dated on the last day of the month, and actually mailed out to all stockholders of record on that day, except in the cases of officers and employees, including the petitioner, whose checks were not mailed

out at all, but were held in the treasurer's office until the first day of the following month and then distributed to such officers and employees through the office mail. (R. 27.)

The taxpayer reported the sums of $266,490.10, $32,656 and $48,984 in his income tax returns for the years 1925, 1929 and 1930, respectively. The Commissioner determined deficiencies for the years 1924 and 1929 on the ground that these sums had been constructively received within the meaning of the applicable Treasury Regulations in the years 1924, 1928, and 1929, respectively. The Board of Tax Appeals decided in favor of the Commissioner and the Circuit Court of Appeals affirmed the decision of the Board. (R. 33, 63, 87.)

SUMMARY OF ARGUMENT

I

The Revenue Act provides that items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer. As applied to dividends, the word "received" is not as clear as at first seems, because there are a number of different times at which it may reasonably be said the taxpayer "received" them. In order to provide a uniform rule and to facilitate the administration of the statute, the Commissioner promulgated a regulation to the effect that dividends are subject to tax when unqualifiedly made subject to the demand of the stockholder.

This provision has been included in every series of Treasury Regulations from 1918 until the present time. Moreover, the statute to which the regulation refers has been substantially reenacted, which amounts to legislative approval of the administrative construction.

The Revenue Act of 1921 incorporated the regulation in Section 201 (e), and the taxpayer contends that the omission of Section 201 (e) from the Revenue Act of 1924 and from the subsequent Revenue Acts rendered the regulations under those Acts invalid, but the legislative history conclusively shows that the reason for the omission was that the provision was considered unnecessary, and that it was the intention of Congress to tax dividends when subject to demand by the taxpayer even though not actually received in cash.

II

The question as to whether the dividends were unqualifiedly made subject to the taxpayer's demand in the taxable years is essentially a question of fact. The Board of Tax Appeals found as a fact that such dividends were made unqualifiedly subject to the taxpayer's demand, and the evidence supports this conclusion. This finding was approved by the Circuit Court of Appeals, and in the absence of clear error such finding will be accepted by this Court.

ARGUMENT

I

THE PROVISIONS OF THE APPLICABLE TREASURY REGULATIONS RELATING TO THE YEAR IN WHICH DIVIDENDS ARE SUBJECT TO TAX ARE VALID

Section 213 (a)[1] of the Revenue Act of 1924 (*infra*, p. 17) provides that the amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer. The word "received" in this statute is not always easy of interpretation but the Commissioner of Internal Revenue has given it a definite interpretation as applied to dividends by the promulgation[2] of Article 52 of Treasury Regulations 65[3] relating to the Revenue Act of 1924, *infra*, p. 17. This regulation provides in part as follows:

> Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder.

It is respectfully submitted that this regulation has the force and effect of law under the decision of this Court in *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349, where the Court said:

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[1] Section 42 of the Revenue Act of 1928, c. 852, 45 Stat. 791, is substantially the same.

[2] Pursuant to the authority vested in him by Section 1001 of the Revenue Act of 1924, *infra*, p. 17. Section 62 of the Revenue Act of 1928 is substantially the same.

[3] Article 1541 of Regulations 65, *infra*, p. 18, and Articles 333 and 621 of Regulations 74, relating to the Revenue Act of 1928, contain substantially the same provision.

> It is settled by many recent decisions of this Court that a regulation by a department of government addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.

The above mentioned provision relating to the time when dividends are subject to tax has been included in every edition of the Treasury Regulations from 1918 until the present time.[4] Moreover, Section 213 (a) of the Revenue Act of 1924, to which the regulation refers, was reenacted without material change in the Revenue Act of 1926,[5] the Revenue Act of 1928,[6] and the Revenue Act of 1932.[7] The reenactment of the statutory provision without material change must be deemed to constitute legislative approval of the administrative construction. *Brewster* v. *Gage,* 280 U.S. 327, 337; *Burnet* v. *Thompson Oil & Gas Co.,* 283 U.S. 301, 307–308; *Murphy Oil Co.* v. *Burnet,* 287 U.S. 299, 307; *United States* v. *Dakota-Montana Oil Co.,* 288 U.S. 459, 466; *Burnet* v. *Brooks,* 288 U.S. 378, 392–393. "Courts are slow to disturb the settled administra-

[4] Regulations 45, Article 54; Regulations 62, Article 63; Regulations 65, Article 52; Regulations 69, Article 52; Regulations 74, Article 333; Regulations 77, Article 333.

[5] Section 213 (a) (U.S.C. App., Title 26, Sec. 954).

[6] Section 42.

[7] Section 42 (U.S.C. Sup. VII, Title 26, Sec. 42).

tive construction of a statute long and consistently adhered to." *Alaska Steamship Co.* v. *United States,* 290 U.S. 256, 262.

The Revenue Act of 1921 incorporated substantially the provisions of the above mentioned regulation in Section 201 (e), which is set forth in a footnote to Appendix B (*infra,* p. 19). The taxpayer argues that the omission of Section 201 (e) from the Revenue Act of 1924 and subsequent Revenue Acts rendered the Treasury Regulations relating to the time when dividends were subject to tax under those Acts invalid. In support of this argument he relies upon the decision of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Adams,* 54 F. (2d) 228, in which the court intimated that the regulation in regard to the constructive receipt of dividends was void because it was in conflict with the express language of Section 213 (a). The court refused to consider the legislative history of the statute, although this Court apparently regards the legislative history as helpful in ascertaining the intention of Congress. *U.S. Cartridge Co.* v. *United States,* 284 U.S. 511, 516-517; *United States* v. *Dakota-Montana Oil Co., supra,* at p. 463.

In the Revenue Act of 1918, Section 201 is silent as to the year in which dividends should be included in gross income. But Article 54 of Treasury Regulations 45 provides that "Dividends on cor-

porate stock are subject to tax when set apart for the stockholder, although not yet collected by him." Section 201 (e) of the Revenue Act of 1921, c. 136, 42 Stat. 227, provided that a taxable distribution made by a corporation to its shareholders should be included in the gross income of the distributees as of the date when the cash was unqualifiedly made subject to their demands. According to the House committee report,[8] the purpose of inserting this provision was to clarify a minor obscurity, but the Senate committee report[9] states that the provision was in accord with the decisions of the courts and was well established in departmental practice.

The committee reports relating to Section 213 (a) of the Revenue Act of 1924, extracts from which are set forth in Appendix B (*infra*, p. 19), show conclusively that the reason Section 201 (e) of the Revenue Act of 1921 was omitted from the Revenue Act of 1924 was that the rule laid down in Section 201 (e) of the Act of 1921 would be followed without an express statutory provision. It appears that Section 213 (a) of the House draft of the Revenue Bill of 1924 provided generally that items of gross income should be considered to be received in the taxable year in which they were unqualifiedly made subject to the demands

[8] H.Rep. No. 350, 67th Cong., 1st Sess., p. 9.

[9] S. Rep. No. 275, 67th Cong., 1st Sess., p. 10.

of the taxpayer. The Ways and Means Committee said in their report that the rule would be followed without an express statutory provision. The Senate struck out the provision, because the rule would be followed in the absence of a statutory provision, and the House accepted the amendment. The Conference Report shows that it was the intention of Congress to require dividends, bond interest, and salaries, such as drawing accounts, to be included in income *when subject to demand by the taxpayer even though not actually received in cash by him,* and that the new provision was considered unnecessary.

In *Shearman* v. *Commissioner,* 66 F. (2d) 256, a case arising under the Revenue Act of 1928 and similar in all respects to the instant case, the Circuit Court of Appeals for the Second Circuit said (p. 258):

> Added assurance that Congress did not intend to change the requirement that dividends unqualifiedly made subject to the taxpayer's demands were to be included in the return for the period within which they were made so is found in the reports of the committees when section 201 (e) of the Act of 1921 was omitted from the Act of 1924. H.Rp. 179, 68th Cong. 1st Sess. pp. 12, 20, 21; S.Rep. 398 68th Cong. 1st Sess. p. 23; H.Conf.Rep. 844, 68th Cong. 1st Sess. pp. 16, 17. These reports clearly show that the

> administrative practice was considered to be well settled and to be in accord with the statute as re-enacted. With such persuasive evidence of the intent of Congress, we hold that T. R. 74, arts. 333 and 621 are valid.

If the taxpayer's argument is sound and Sections 213 (a) and 42 of the Acts of 1924 and 1928, respectively, do not permit the doctrine of constructive receipt, then a taxpayer would be able to manipulate his income from dividends by failing or refusing to reduce it to possession until it suited him to do so. Such a result would not be compatible with a system based upon yearly gains and losses. See *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 363.

II

UNDER THE CIRCUMSTANCES OF THIS CASE THE DIVIDENDS WERE UNQUALIFIEDLY MADE SUBJECT TO THE TAXPAYER'S DEMAND AT THE TIME WHEN THEY WERE PAYABLE UNDER THE TERMS OF THE APPLICABLE TREASURY REGULATIONS

Articles 52 and 333 of Treasury Regulations 65 and 74, respectively (*infra*, pp. 17–18) provide that dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder. The Board of Tax Appeals decided that under the circumstances of this case, the dividends in question were unqualifiedly made sub-

ject to the taxpayer's demands on December 31 of the years involved. The Board said (R. 33, 62):

> On the facts before us we are of the opinion that the dividends were receivable by the petitioner on the dates payable. Being thus receivable on such dates they were constructively received by the petitioner during the taxable years in controversy and therefore were subject to tax in such years.

Under the theory of the petitioner, if a stockholder accepted his check for dividends on the last day of the calendar year, he would be required to return such dividends in his income for that year, while the stockholder who allowed his check to remain in the treasurer's office until the first business day of the following year would not return the same as a part of his income until the following year.

Again, if the corporation saw fit to mail out the checks for dividends in time for all stockholders living in the same city to receive their checks on the last day of the month, and those living farther away to receive theirs on the first business day of the next succeeding month, we would have different stockholders in the same corporation returning dividends for taxes in different years. The effect of this ruling might be to impose unequal tax burdens on different stockholders in the same corporation. The law contemplates no such discrimination. To adopt the rule announced by the court below holding the dividends to be income when made available

to the stockholder, would establish uniformity in the application of the statute and carry out the intent of the Congress in its adoption.

Inasmuch as the question whether a dividend is unqualifiedly made subject to the demand of the stockholder purports to be a question of fact, the Board's decision is conclusive if there is evidence to support it. The resolution of November 1924 provides that amounts equivalent to the various dividends be transferred to the dividend account and be paid *on or before* December 31, 1924. (R. 24–25.) The resolutions of November 1928 and November 1929 were similarly worded. (R. 25–26.) The dividend checks were mailed on the last day of the month, except in the case of officers and employees, including the taxpayer, where the checks were not mailed but were held in the treasurer's office until the first business day of the following month and then distributed through the office mail. (R. 27.) This evidence indicates that the corporation had funds available on December 31 with which to pay the dividends, and if the taxpayer had demanded the dividends on that day he would have received them.

The court below considered the evidence and adopted the finding made by the Board that the dividends were unqualifiedly made subject to the demands of the taxpayer in the years 1924 and 1929.

Such findings will be accepted by this Court in the absence of clear error. *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U.S. 548.

In *Commissioner* v. *Bingham*, 35 F. (2d) 503 (C.C.A. 6th), certiorari denied, 281 U.S. 729, it was held that a dividend is unqualifiedly made subject to the taxpayer's demand at the time that it is payable. In that case the court said (p. 504):

> The dividend was declared and payable in 1922. It follows, therefore, that the respondent immediately and before the expiration of the year 1922 became a creditor of the corporations. * * * As a creditor, he had a right to demand his debt in money, for debts are payable in money. In other words, the cash was subject to his demand. The corporations were then liable. He was not required to take the checks even when issued, for they were not payment as a matter of law. That the checks were issued is relevant only as emphasis upon the proposition that at that time the cash was admittedly and unqualifiedly subject to the respondent's instant demand. * * * That it was not convenient and was perhaps physically impossible for him to appear at the offices of the various corporations before the year closed and demand the cash did not destroy his legal right to do so.

Inasmuch as the dividends in the instant case were declared in November and payable *on or before* December 31, the case is stronger than either the *Bingham* or the *Shearman* case. The resolution having provided that the dividends should be

paid on or before December 31, the Board correctly decided that they were unqualifiedly made subject to the demands of the taxpayer in the year that they were payable, regardless of when they were actually received by the taxpayer.

In the *Adams* case, upon which the taxpayer relies, the resolution of the board of directors was worded differently and expressly provided that checks for the dividends were *to be mailed* on December 31, 1928. In the *Shearman* case the court pointed out this distinction (p. 258):

> They were not payable by checks to be mailed as were the dividends considered in *Commissioner* v. *Adams,* (C.C.A.) 54 F. (2d) 228, and perhaps that case differs from this in that the taxpayer was there entitled to receive the dividends only at such time as checks mailed were delivered. Here the time when the taxpayer was entitled to receive the dividends was definitely fixed by the resolution to be at the close of business on a day within the 1928 taxable period. The moment when the taxpayer was entitled to the use and benefit of them without qualification was not, as in the Adams Case, only after the time necessary for transmission of checks by mail had expired. This being so, the taxpayer was bound to return them as income in her return for 1928.

CONCLUSION.

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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APRIL, 1934.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 213. For the purposes of this title, except as otherwise provided in section 233—
>
> (a) The term "gross income" includes gains, profits, and income * * *. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period. (U.S.C., Title 26, Sec. 954.)
>
> SEC. 1001. The Commissioner, with the approval of the Secretary, is authorized to prescribe all needful rules and regulations for the enforcement of this Act. (U.S.C., Title 26, Sec. 1245.)

Sections 42 and 62 of the Revenue Act of 1928, c. 852, 45 Stat. 791, are substantially the same as the provisions of the Revenue Act of 1924 quoted above.

Treasury Regulations 65, relating to the Revenue Act of 1924:

> ART. 52. *Examples of constructive receipt.*—* * * Dividends on corporate stock are subject to tax when unqualifiedly

made subject to the demand of the stockholder. * * *

ART. 1541. *Dividends.*—* * *

A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 52.

Articles 333 and 621 of Treasury Regulations 74, relating to the Revenue Act of 1928, contain substantially the same provisions as Articles 52 and 1541 of Treasury Regulations 65, just quoted.

APPENDIX B

Extracts from Committee Reports showing reasons for omitting from the Revenue Act of 1924, Section 201 (e) of the Revenue Act of 1921.[10]

H. Rep. No. 179, 68th Cong., 1st Sess., pp. 12, 20–21:

> Subdivision (e) of the present law is omitted in this bill, but is covered by a general provision in Section 213 (a) of the bill.
>
> * * * * *
>
> It is provided in section 213 (a) that items of gross income shall be considered to be received in the taxable year in which they are unqualifiedly made subject to the demands of the taxpayer. This is a general provision which corresponds to the narrow provisions of Section 201 (e) of the existing law and merely states in the statute the rule which would be followed without an express statutory provision.

S. Rep. No. 398, 68th Cong., 1st Sess., p. 23:

> Section 213 (a): A new sentence has been added to the definition of gross income, pro-

[10] Section 201 (e) of the Revenue Act of 1921, c. 136, 42 Stat. 227, provides as follows:

> For the purposes of this Act, a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands.

Section 213 (a) of the Revenue Act of 1921 expressly refers to Section 201 (e) as an exception to the rule in regard to the receipt of income.

viding that items of gross income shall be considered to be received in the taxable year in which they are unqualifiedly made subject to the taxpayer's demands. This is a statutory enactment of the rule followed by the department, as well as a more general application of a similar provision in section 201 (e) of the existing law.

H. Conference Rep. No. 844, 68th Cong., 1st Sess., pp. 16–17:

Amendment No. 43: The House bill provided that items of gross income should be considered to be received in the taxable year in which they are unqualifiedly made subject to the demands of the taxpayer. This provision was designed to require dividends, bond interest, and salaries such as drawing accounts, to be included in income when subject to demand by the taxpayer even though not actually received in cash by him. Since this is the rule which is and should be followed in such cases in the absence of a statutory provision, the Senate amendment strikes out the provision; and the House recedes.

SUPREME COURT OF THE UNITED STATES.

Nos. 791 and 792.—October Term, 1933.

Sewell Lee Avery, Petitioner, 791 *vs.* Commissioner of Internal Revenue. Sewell L. Avery, Petitioner, 792 *vs.* Commissioner of Internal Revenue.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 30, 1934.]

Mr. Justice McReynolds delivered the opinion of the Court.

The petitioner was a large stockholder and president of the United States Gypsum Company. In November, 1924, the Company declared a dividend payable on or before the 31st day of December following. Its check, dated December 31st for the amount attributable to his stock, payable to him, was received by petitioner January 2, 1925. In November, 1929, another dividend was declared, payable on or before the following December 31st and the Company's check for petitioner's portion was received by him January 2, 1930.

Annually dividend checks, signed by the proper corporate officers, and dated December 31st were on that day mailed out to all stockholders except those who were officers and employees, including the petitioner. Checks for the latter were held in the treasurer's office until the first business day of the next month and then distributed through the office mail.

The Company declared dividends quarterly; and in every instance they were made payable on or before the last day of some month. The dividend checks never left the treasurer's office or went to the mailing department until the afternoon of the last day of the month. They were mailed on the last day of the month so as to be in the stockholders' hands on the first business day of the following month. The practice was without exception that no stockholder, whether employee or officer, should receive his check before the first business day of the month following the month in which the dividend was made payable.

Petitioner kept his accounts on the cash receipts and disbursements and calendar year basis.

The Commissioner assessed the dividends above described as part of the petitioner's income for the years 1924 and 1929. The Board of Tax Appeals approved; and the court below affirmed this action. The facts are not in dispute. The only question for our determination is when, within intendment of the statutes, the dividends were "received" by petitioner.

He maintains that under the plain language of the Revenue Acts of 1924 and 1928 the dividends—like other assessable items—should be treated as income for the taxable years during which they were actually received—1925 and 1930. The Commissioner claims that under Treasury Regulations promulgated in 1921 and in effect ever since, the dividends constituted income for the years in which they were declared and made payable.[1] The regulation specially important here (No. 65, Art. 1541) follows:—

> "Dividends. . . . A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands."

The Revenue Act of 1924, c. 234, 43 Stat. 253, provides—

> "Sec. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.
>
> "Sec. 213. For the purposes of this title, . . .
>
> "(a) The term 'gross income' includes gains, profits, and income . . . . The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting

[1] See Treasury Regulations, No. 62 (1921), Arts. 53 and 1541; No. 65 (1924), Arts. 52 and 1541; No. 69 (1926), Arts. 52 and 1541; Nos. 74 and 77 (1928-32), Arts. 383 and 621.

permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

"Sec. 1001. The Commissioner, with the approval of the Secretary, is authorized to prescribe all needful rules and regulations for the enforcement of this Act."

Sections 41, 42 and 62, Revenue Act of 1928, c. 852, 45 Stat. 791, are substantially like corresponding ones quoted from the 1924 Act. Similar provisions appear in the Revenue Act of 1918 and all subsequent ones.

The Revenue Act of 1921, c. 136, 42 Stat. 227, 229, is peculiar in that it makes distinction between dividends and other income items by the following provision which does not appear in subsequent Acts.

"Sec. 201. (e) For the purposes of this Act, a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands."

If we give the words of the statutes their ordinary meaning, clearly the dividends under consideration were not actually received by the taxpayer during 1924 and 1929. Certainly, they were not received when declared. They did not come into the taxpayer's hands on December 31st simply because payable on that day. And unless Congress has definitely indicated an intention that the words should be construed otherwise, we must apply them according to their usual acceptation.

The petitioner insists that the word "receive" is free from ambiguity and admits of no interpretation; the statute furnishes the sole measure as to when dividends are to be reported.

In behalf of the Commissioner it is said—

The Revenue Act directs that the amount of all such (specified) items shall be included in the gross income for the taxable year in which received by the taxpayer. The word "received", as applied to dividends, is not entirely clear since there are different times at which it reasonably may be claimed the taxpayer receives them. To meet this situation the Commissioner promulgated the regulation that dividends are taxable when unqualifiedly made subject to the stockholder's demand. This provision has

been included in all Treasury Regulations since 1918 and has been approved and accepted by Congress through subsequent re-enactments of the statute. When a dividend unqualifiedly becomes subject to a taxpayer's demand is essentially a question of fact. Here, the Board of Tax Appeals and the Circuit Court of Appeals agree that the dividends were subject to the taxpayer's demand on December 31st.

It is unnecessary for us to determine how far the quoted Treasury Regulation was incorporated into the Acts of 1924 and 1928. If we assume that the Regulation, in effect, became part of those enactments, nevertheless we think the Commissioner's action was erroneous. In the disclosed circumstances the dividends cannot properly be considered as cash or other property unqualifiedly subject to the petitioner's demand on December 31st. It was the practice of the Company to pay all dividends by checks not intended to reach stockholders until the first business day of January; there is nothing to show that petitioner could have obtained payment on December 31st, he did not expect this and the practice shows the company had no intention to make actual payment on that day. Nothing indicates that it recognized an unrestricted right of stockholders to demand payment except through checks sent out in the usual way. The checks did not constitute payments prior to their actual receipt. The mere promise or obligation of the corporation to pay on a given date was not enough to subject to petitioner's unqualified demand "cash or other property"; and none of the parties understood that it was.

This subject has been considered with varying results in *Commissioner* v. *Bingham*, 35 F. (2d) 503 (1929); *Hadley* v. *Commissioner*, 36 F. (2d) 543 (1929); *Commissioner* v. *Adams*, 54 F. (2d) 228, 230 (1931); *Shearman* v. *Commissioner*, 66 F. (2d) 256 (1933). The facts here disclose a situation substantially like that in *Adams* case; and we agree with the conclusion of the court therein, stated as follows: "We are also of the opinion that, on the facts found, the dividends were 'not unqualifiedly made subject to the demand of the stockholder,' in the year 1924, if article 52 of the Departmental Regulations can be said to be valid and not in conflict with the express language of section 213 (a)."

Reversed.